Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1993

CITIZENS FOR TERM LIMITS,
Petitioner,

v.

THOMAS FOLEY, JOHN CLUTE, GEORGE CHEEK, LEAGUE OF WOMEN VOTERS OF WASHINGTON, MARGARET COLONY, TIMOTHY S. ZENK, WILLIAM FIRST, and SUSAN THORSTED, et al.,
Respondents.

Petition for Writ of Certiorari to the Court of Appeals, Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a statute, enacted by voter initiative, which temporarily restricts incumbent congressional officeholders who have previously served a set number of consecutive terms from appearing on the ballot for the same office as previously served, violate the Qualifications Clauses of Article I of the United States Constitution?

2. Does a statute, enacted by voter initiative, which temporarily restricts incumbent congressional officeholders who have previously served a set number of consecutive terms from appearing on the ballot for the same office as previously served, violate the First and Fourteenth Amendments of the United States Constitution?

PARTIES TO THE PROCEEDING

The petitioner in this Court is Citizens for Term Limits. Petitioner was a defendant-intervenor in the Western District Court for the State of Washington and has appealed that decision to the Court of Appeals for the Ninth Circuit. Petitioner is a nonprofit corporation organized under the laws of California. It has no parent companies or subsidiaries.

The respondents in this Court who were plaintiffs in this action in the Western District Court for the State of Washington and who have cross-appealed in the Ninth Circuit Court of Appeals solely on the issue of attorneys' fees, are: Thomas Foley, John Clute, George Cheek, League of Women Voters of Washington, Margaret Colony, Timothy S. Zenk, William First, and Susan Thorsted.

Other respondents who defended Initiative 573 in the court below and are appellants in the Ninth Circuit Court of Appeals are: Christine O. Gregoire, Ralph Munro, LIMIT, Sherry Bockwinkel, U.S. Term Limits, Alan M. Gottlieb, Lee Gill, and Wilbur B. McPherson.

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OPINION BELOW

The decision of the Western District Court for the State of Washington is reported at 841 F. Supp. 1068 (1994), and is reproduced as Appendix A (App.). Page references are to the version in the appendix.

JURISDICTION

The decision of the Western District Court for the State of Washington was entered on February 10, 1994, and was filed that same day. No petition for rehearing was sought. All parties timely appealed to the Ninth Circuit Court of Appeals where the case is currently pending (consolidated Docket Nos. 94-35222, 94-35223, 94-35267, 94-35285, 94-35287, 94-35289). This petition for writ of certiorari before judgment has been timely filed in accordance with Rule 11 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1254(1), 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 2, of the United States Constitution provides in pertinent part: "No person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

Article I, Section 3, of the United States Constitution provides in pertinent part: "No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."

Article I, Section 4, of the United States Constitution provides in pertinent part: "The Times, Places and Manner

of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

Amendment I of the United States Constitution provides in pertinent part: "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Amendment XIV of the United States Constitution provides in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Initiative 573 is set forth in Appendix C.

STATEMENT OF THE CASE

Recent calls for legislative rotation in office directly result from the relatively new phenomenon of career politicians. Neither the Washington Constitution or statutes nor the United States Constitution originally provided for rotation of any kind. The United States Constitution was the first to be amended to include mandatory rotation in office. The Twenty-Second Amendment, adopted in 1951, limited the office of the Presidency to two terms, the result of a motivating desire to prevent "dynasty building." In 1992, Washingtonians (along with 13 other states) decided that the same kind of corrective action was necessary to curtail

"dynasty building" in Congress and to that end, enacted Initiative 573 (I-573), not as a permanent term limit, but as a temporary restriction on longtime incumbents' access to the ballot to encourage rotation in office.

By amending the state elections statutes, the People of Washington expressly identified the ills sought to be corrected:

> (1) The people will best be served by citizen legislators who are subject to a reasonable degree of rotation in office;
>
> (2) Entrenched incumbents have become indifferent to the conditions and concerns of the people;
>
> (3) Entrenched incumbents have an inordinate advantage in elections because of their control of campaign finance laws and gerrymandering of electoral districts;
>
> (4) Entrenched incumbency has discouraged qualified citizens from seeking public office;
>
> (5) Entrenched incumbents have become preoccupied with their own reelection and devote more effort to campaigning than to making legislative decisions for the benefit of the people;
>
> (6) Entrenched incumbents have become closely aligned with special interest groups who provide contributions and support for their reelection campaigns, give entrenched incumbents special favors, and lobby office holders for special interest legislation to the detriment of the

> people of this state, and may create corruption or the appearance of corruption of the legislative system;
>
> (7) The people of Washington have a compelling interest in preventing the self-perpetuating monopoly of elective office by a dynastic ruling class.

I-573, Section 1.

In furtherance of its stated goals, I-573 imposes ballot access restrictions on longtime incumbents at both the state and federal levels. The plaintiffs below (including Speaker of the House of Representatives Thomas Foley) challenged only those sections of I-573 affecting Washington's delegation to the United States Congress. I-573 states that no person is eligible to appear on the ballot or file a declaration of candidacy for the House of Representatives who, by the end of the then current term of office, will have served, or but for resignation would have served, during six of the previous twelve years. The same restriction is placed on Senators who will have served, or but for resignation would have served, during twelve of the previous eighteen years. The challenge below centered on the issues arising from the Qualifications Clauses of Article I of the United States Constitution and the freedoms of speech and association (including the right to vote) in the First and Fourteenth Amendments of the Constitution. Thus, federal jurisdiction is based on the important federal questions presented in the first instance by the plaintiffs in the District Court.

I-573 does not prevent any incumbent from running for office or being elected for office despite the number of terms previously served. Rather, I-573 seeks to break the cycle of automatic reelection for incumbent officeholders by

eliminating just one of the many advantages an incumbent holds over a challenger. Common Cause estimates that only 23 of the 405 incumbents running for reelection in 1990 faced challengers with more than 50% of the incumbents' campaign resources. *In Congress, Money Talks--and Re-elects*, Chicago Tribune, Nov. 20, 1990, at 1, col. 3, *cited in* Erik H. Corwin, *Recent Developments, Limits on Legislative Terms: Legal and Policy Implications*, 28 Har. J. on Legis. 569, 575 n.36 (1991). The single disallowed advantage is the ability to have the incumbent's name preprinted on the ballot for a period of six years.

The erroneous decision of the District Court for the Western District of Washington conflicts with numerous decisions of this Court and other federal and state courts. For the reasons set forth below, Citizens for Term Limits hereby urges this Court to grant this petition for writ of certiorari and reverse the decision below.

REASONS FOR GRANTING THE WRIT

The unusual filing of this petition for writ of certiorari before judgment in the Ninth Circuit Court of Appeals is warranted by the tremendous nationwide impact of the decision below and the ever-increasing importance of the issues at bar. This petition is timed to coincide with the petitions for writ of certiorari to be filed by the State of Arkansas and U.S. Term Limits seeking review of *U.S. Term Limits v. Hill*, 316 Ark. 251, 1994 WL 72581 (1994). The simultaneous granting of these writs would present this Court with two variations of a type of initiative sweeping the nation. In fact, the Washington initiative (unlike the Arkansas initiative) presents the more common provision of restricting ballot access for a particular office only

temporarily, rather than permanently. *Compare* Wash. Init. 573, § 4 ("[n]o person is eligible to appear on the ballot ... for the United States house of representatives who ... will have served ... as a member ... during six of the previous twelve years") *with* Ark. Const. Amend. 73, § 3 ("[a]ny person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be ... eligible to have his/her name placed on the ballot").

Reviewing the case decided by the Arkansas Supreme Court would present this Court with the opportunity to decide only one of the important national issues surrounding ballot access restrictions for longtime incumbents. The *Hill* case addressed only the Article I implications of restricting ballot access for congressional incumbents. The case at bar presents in addition to the Article I issue, the equally important First and Fourteenth Amendment issues regarding the freedoms of speech and association (including the right to vote). To decide both of these very important questions in a timely manner, both the Arkansas and Washington decisions should be reviewed.

Finally, the District Court decision in this case conflicts with numerous decisions of this Court, the United States Courts of Appeals, and state high courts.

Rule 11 of the Supreme Court Rules contemplates early action by this Court in the circumstances presented by this case: the case is of such imperative public importance as to justify deviation from normal appellate practice and it requires immediate settlement in this Court.

ARGUMENT

I

THIS CASE OF EXTREME PUBLIC IMPORTANCE IS IN NEED OF IMMEDIATE RESOLUTION BY THIS COURT

The importance of the District Court for the Western District of Washington's decision in *Thorsted v. Gregoire* cannot be understated, even at this relatively early stage in its litigation history. The Arkansas Supreme Court's decision in *U.S. Term Limits v. Hill* cited *Thorsted* three times on the issues of justiciability and the write-in candidacy provisions effect on the Qualifications Clause arguments. *Hill*, 1994 WL 72581 at 4, 8. Cases are pending in the District Court for the Northern District of Florida (*Plante v. Smith*, Docket No. 92-CV-40410) and the Nebraska Supreme Court (*Duggan v. Beermann*, Docket No. 92-907). Without an immediate decision by this Court, the courts in pending and future cases will lack the guidance necessary in litigation with such broad ramifications.[1]

This Court has granted certiorari before judgment in several cases that presented issues of national importance. *See, e.g., United States v. United Mine Workers of America*,

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[1] Two state Supreme Courts have declined to rule on congressional term limitation or ballot access restrictions altogether until this Court renders an opinion on the subject. *Advisory Opinion to the Attorney General*, 592 So. 2d 225, 227 (Fla. 1991); *Opinion of the Justices to the Senate*, 413 Mass. 1201, 1216-17, 595 N.E.2d 292, 301-02 (1992).

330 U.S. 258, 268 (1947) (unilateral termination of union agreement and illegal strike); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952) (seizure of steel companies); *New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970) (railroad consolidation); *United States v. Nixon*, 418 U.S. 683, 690 (1974) (compelled production of presidential tapes); *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981) (attachment of Iranian assets); and *Mistretta v. United States*, 488 U.S. 361, 362 (1989) (sentencing guidelines). These cases share the same fundamental, nationwide importance as the case at bar. Just as this Court has previously granted certiorari before judgment in a case which "touch[es] fundamentally upon the manner in which our Republic is to be governed," *Dames & Moore*, 453 U.S. at 659, this case presents issues that will similarly impact the manner in which Americans are governed.

The nature and importance of this case is directly related to the need for immediate resolution. In *Joyner v. Mofford*, 706 F.2d 1523, 1527 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983), the Ninth Circuit noted that "[a]ppellate courts are frequently too slow to process appeals before an election determines the fate of a candidate." In this case, the Ninth Circuit may be too slow to save the numerous initiatives that are on the ballot or that have been enacted but are now vulnerable to challenge. Despite the fact that the congressional officeholders affected by Initiative 573 will not be barred from the Washington ballot (assuming continuous reelection) until 1998, the court below found the issues of ballot access and term limits ripe for adjudication and enjoined enforcement of the measure. App. at A-11. Similar challenges are certain to arise on the basis of this decision well before the ballot access restrictions in the various states affect incumbents.

The results of these lawsuits will immediately impact on the similar initiatives on state ballots in November as well. Alaska, Maine, Massachusetts and Oklahoma citizens have already submitted signatures to have ballot access restrictions initiatives placed on the ballot. Citizens in Idaho, Illinois, Mississippi, Nevada, Utah, and the District of Columbia are gathering signatures. Moreover, of the states that have either enacted ballot access or term limit initiatives or have qualified such initiatives for the November, 1994, ballot, eight--Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, and Washington--are in the Ninth Circuit and will be directly affected by the *Thorsted* litigation.[2] The fate of these present and future initiatives rests with this Court. Opponents of ballot access restrictions--the incumbent legislators themselves--will continue to use the confusion in this area of the law to their advantage until this Court conclusively resolves this issue.

II

THE DECISION BELOW CONFLICTS WITH THIS COURT'S BALLOT ACCESS DECISIONS UNDER THE FIRST AND FOURTEENTH AMENDMENTS

Without a doubt, the emergence of ballot access restrictions on longtime incumbents and outright term limits are a new phenomenon in American politics. This Court has

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[2] Ariz. Const. Art. VII, § 18; Cal. Elec. Code § 25003; Mont. Const. Art. IV, § 8; Ore. Const. Art. II, § 20; Wash. Rev. Code § 29.68. Other state provisions include Colo. Const. Art. XVIII, § 9; Fla. Const. Art. 6, § 4; Mich. Const. Art. II, § 10; Mo. Const. Art. III, § 45; Neb. Const. Art. XV, § 19; N.D. Cent. Code § 16.1-01-13.1; Ohio Const. Art. V, § 8; S.D. Const. Art. III, § 32; and Wyo. Stat. § 22-5-104.

not yet ruled on these issues. However, this Court has resolved numerous issues involving ballot access in the context of the First and Fourteenth Amendments. The rules of law set forth in these cases--*Jenness v. Fortson*, 403 U.S. 431 (1971); *Storer v. Brown*, 415 U.S. 724 (1974), *Clements v. Fashing*, 457 U.S. 957 (1982), *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. ___, 119 L. Ed. 2d 245 (1992)--to name but a few, have been sufficiently straightforward that with only one exception, lower courts have unanimously upheld state and local term limits and ballot access restrictions against challenges based on the freedom of speech, the freedom of association, and the right to vote. The one exception is the court below.[3]

States reserve the initial and primary responsibility for fashioning election laws. U.S. Const. Art. I, § 4. Election laws must, of course, comply with federal constitutional guarantees of freedom of speech and association (including the right to vote) and equal protection of the laws. If Congress disapproves of a state's election laws, it maintains the ultimate power to alter or repeal them. *Id.* It is within this constitutional framework that I-573 must be analyzed.

In *Jenness v. Fortson*, 403 U.S. 431, this Court analyzed a Georgia law which permitted a candidate for elective office (including Congress) who did not enter and win a political party's primary election to have his or her

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[3] Even the Arkansas Supreme Court upheld the ballot access restrictions on state officeholders. *Hill*, 1994 WL 72581 at 12. As noted above, the Arkansas court did not address First and Fourteenth Amendment issues with regard to the provisions of Amendment 73 relating to incumbent members of Congress.

name printed on the ballot at the general election only if he or she filed a nominating petition signed by at least 5% of the number of registered voters at the last general election for the office in question. *Jenness*, 403 U.S. at 432. Potential candidates for state and federal office and voters sued on freedom of speech and association and equal protection grounds. The Court upheld this 5% petition requirement for nominees, noting that the statutory scheme did not limit the right of a voter to write in on the ballot the name of the candidate of his choice or to have that write-in vote counted. *Jenness*, 403 U.S. at 434.

The potential to write in a vote was considered key because in an earlier case, *Williams v. Rhodes*, 393 U.S. 23, 24 (1968), this Court had struck down a state's somewhat analogous election scheme in part because it failed to permit write-in votes. *Jenness*, 403 U.S. at 436, 438. To follow *Jenness*, a court must determine whether the challenged laws "freeze" the status quo by effectively barring all candidates other than those of the major parties, *Jenness*, 403 U.S. at 439, and provide a realistic means of ballot access. *American Party of Texas v. White*, 415 U.S. 767, 783 (1974). Despite I-573's purpose and effect to eliminate the *de facto* freeze that exists in congressional elections, the District Court below never mentioned *Jenness*.

This Court's decision in *Storer v. Brown*, 415 U.S. at 730, explained the extent to which states were expected to regulate elections.

> [T]he States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and

> the selection and qualification of candidates. ... [T]he rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause.

Storer, 415 U.S. at 730. In *Storer*, this Court upheld a California statute which forbade a ballot position in a general election to an independent candidate if he or she had registered affiliation with a political party within one year prior to the preceding primary election. That statute also required the candidate to file a nominating petition with not less than 5% of the entire vote cast in the preceding general election. *Storer*, 415 U.S. at 726-27, 733. *Storer* noted that an independent candidate need not stand for primary election but must qualify for the ballot by demonstrating substantial public support in another way. Other than the alternate means of qualifying to have his or her name preprinted on the ballot, the qualifications required of the independent candidate are very similar to, or identical with, those imposed on party candidates. *Storer*, 415 U.S. at 733. The disaffiliation requirement does not change its character when combined with other provisions of the electoral code. "It is an *absolute bar to candidacy, and a valid one.*" *Storer*, 415 U.S. at 737 (emphasis added). Despite the obvious relevance of this case upholding a statute which barred a candidate for Congress from appearing on a state ballot, the District Court barely mentions this case. App. at A-23. *Storer* directly contradicts the ruling below, in which the District Court asserts that any candidate "hobbled" by an inability to appear on the ballot suffers First and Fourteenth Amendment violations. In no way does the District Court attempt to distinguish or harmonize its holding with this Court's decision in *Storer*.

In *Clements v. Fashing*, 457 U.S. 957, this Court upheld provisions of the Texas Constitution limiting a public official's ability to become a candidate for another public office, holding that such restrictions did not violate the First or Fourteenth Amendments. One of the provisions challenged rendered an officeholder ineligible for the Texas Legislature if his current term of office would not expire until after the legislative term to which he aspires begins. This Court held that the Texas classifications did not impose special burdens on minority political parties or independent candidates, nor did they in any way depend upon political affiliation or political viewpoint. *Clements*, 457 U.S. at 965.

The facts of *Clements* support consecutive term limits under an equal protection claim. In Texas, the term of office for a Justice of the Peace is four years, while legislative elections are held every two years. Therefore, a Justice of the Peace may be required to wait two years--one election cycle--before he could run as a candidate for the legislature. A "waiting period" is an "insignificant" or "de minimus" barrier to candidacy. *Clements*, 457 U.S. at 967, 971-72. In this case, assuming he is reelected twice, respondent Thomas Foley must simply run and win as a write-in candidate for the next four elections after serving three consecutive terms under the provisions of I-573 before again having his name preprinted on the ballot for the House of Representatives. Eight years running as a write-in candidate is not any more burdensome than a two-year outright ban on running for election; and is not nearly as burdensome as the lifetime ban upheld in *Legislature v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309 (1991), *cert. denied*, ___ U.S. ___, 117 L. Ed. 2d 516 (1992). Of course, if running as a write-in candidate is unappealing, respondent Foley retains the option of running for United States Senate or any other public office with his name on the ballot. Despite the parallels between

Clements and the case at bar, the District Court again refused to distinguish or even discuss this important authority.

The balancing test outlined in *Anderson v. Celebrezze*, 460 U.S. at 786, provides the framework for this Court's analysis of ballot access measures, including I-573:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789. *See also Burdick v. Takushi*, 119 L. Ed. 2d at 253. The court below, although it recited this test, App. at A-28-29, did not apply it to the provisions of I-573. Instead, the court simply announced that because the ballot access restrictions were qualifications, they must also be unconstitutional under Article I, Section 4, of the United States Constitution. App. at A-29. The District Court only actually mentions the First and Fourteenth Amendments once, and found I-573 to be "neither neutral, nor nondiscriminatory, nor narrowly drawn." App. at A-29. However, the court never set forth in what ways I-573 fits this characterization. Certainly on its face, as several state and federal courts have recognized when construing similar

measures, I-573 is neutrally applied to all candidates and voters. It does not discriminate on the basis of race, gender, national origin, political affiliation, whether one voted for the measure or against it, or anything else. The District Court's *non sequitur* demonstrates the confusion with which the court below analyzed the two separate issues.

The write-in provision of I-573, although largely ignored by the District Court, substantially mitigates the burdens imposed by I-573 and should be weighed heavily in the balancing test. In fact, courts usually uphold ballot access restrictions where write-in voting is an available alternative. *Storer*, 415 U.S. at 736 n.7; *Jenness*, 403 U.S. at 438; *Unity Party v. Wallace*, 707 F.2d 59, 62 (2d Cir. 1983). Even though the opportunity to conduct a write-in campaign weighs in favor of upholding a ballot access restriction, such restrictions may be upheld even when write-in voting was *not* an available alternative. *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board*, 844 F.2d 740, 745 n.8 (10th Cir. 1988); *Hall v. Simcox*, 766 F.2d 1171, 1172 (7th Cir. 1985); *Erum v. Cayetano*, 881 F.2d 689 (9th Cir. 1989). With the exception of the District Court here, and the Supreme Court of Arkansas, courts have given substantial deference to state election regulations enacted under Article I, Section 4, of the United States Constitution.

The court below appears to assume, without explicitly so stating, that the analysis under the First and Fourteenth Amendments differs depending on whether the interests are related to state or federal officers. App. at A-23-27. This assumption is the only possible explanation for the court's departure from such overwhelming case law upholding ballot access restrictions and term limits on state and local officials. This assumption is simply false. The speech and association interests allegedly burdened are identical whether the affected

candidate is running for city council, state legislature, or a seat in Congress. *Compare Miyazawa v. City of Cincinnati*, 825 F. Supp. 816, 819 (S.D. Ohio 1993) (plaintiffs claim violation of freedom of speech, association, and right to vote) *and Legislature v. Eu*, 54 Cal. 3d at 514, 816 P.2d at 1322 (same) *with Thorsted v. Gregoire*, App. at A-6 (same). The problem with the District Court's analysis of these cases is twofold. First, these cases are mentioned only in the section of the opinion purporting to analyze the Qualifications Clauses. App. at A-22-27. Second, while setting out the balancing test used in ballot access cases, the District Court used the wrong state interests to balance against the burdens imposed by I-573. The court again misidentifies the state interest as to "prevent congressional incumbents from winning." App. at A-29. However, the findings set forth in the initiative do not support this characterization. The findings describe the People's desire to have the very best representatives in Congress and, to that end, to make the elections more competitive to increase the likelihood that the best potential representatives will run for office. By using First and Fourteenth Amendment cases in the wrong context, and misapplying the balancing test, the District Court held that I-573 improperly adds a qualification to those listed in Article I and violates the First and Fourteenth Amendments. App. at A-27, A-29.

Because the court below failed to apply the decisions of this Court to the ballot access restriction before it, this petition for writ of certiorari should be granted and the decision of the Western District of Washington Court should be reversed.

III

THE DECISION BELOW CONFLICTS WITH SEVERAL STATE SUPREME COURT BALLOT ACCESS CASES DECIDED ON FIRST AND FOURTEENTH AMENDMENT GROUNDS

The high courts of Arkansas, New York, California, and West Virginia have each rejected claims that ballot access restrictions and term limits violate the First and Fourteenth Amendments. In *U.S. Term Limits v. Hill*, 1994 WL 72581, the Arkansas Supreme Court did not reach the issue of whether ballot access restrictions in federal elections violated the First and Fourteenth Amendments. However, the court rejected those arguments in the context of the restrictions on candidates in state elections. 1994 WL 72581 at 11 (citing *Bullock v. Carter*, 405 U.S. 134 (1972)). After noting that the right to candidacy is not a fundamental right, the court applied the balancing test of *Anderson v. Celebrezze*, 460 U.S. 780. The court then held that "the state interest, as expressed in the Preamble to Amendment 73, is sufficiently rational and even compelling when weighed against the residual burden placed on the rights and privileges of elected officeholders and those desiring to support them." *Hill*, 1994 WL 72581 at 12. There is no substantive difference between ballot access restrictions on federal or state office candidates to alter the First and Fourteenth Amendment analysis.

The New York Court of Appeals also recently held that term limits for members of New York City's City Council did not violate the First and Fourteenth Amendment rights of either candidates or voters. *Roth v. Cuervas*, 82 N.Y.2d 791, 624 N.E.2d 689, 604 N.Y.S.2d 551, *aff'g and adopting opinion in* 158 Misc. 2d 238, 603 N.Y.S.2d 962 (1993).

The compelling state interests supporting term limitation are already documented in case law and elsewhere. California's Political Reform Act of 1990, enacted as Proposition 140, applies only to state officeholders and prohibits incumbents who have served six years in the Assembly or eight years in the Senate from *ever* holding those offices again. The California Supreme Court found that "the interests of the state in incumbency reform outweigh any injury to incumbent officeholders and those who would vote for them." *Eu*, 54 Cal. 3d at 524, 816 P.2d at 1328. The court noted that the lifetime ban affected voters' and candidates' rights "to a degree," but that mitigating aspects, "including the voters' continued right to vote for any qualified candidates, as well as the candidates' ability to run for other public offices [and] their entitlement to a significant period of service in office before the term limitations apply" outweighed those effects on voters and candidates. *Id.* at 519, 816 P.2d at 1325.

The West Virginia Supreme Court reached the same conclusion. In *State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 223 S.E.2d 607, *appeal dismissed sub nom., Moore v. McCartney*, 425 U.S. 927 (1976), the court upheld a two term limitation on the Governor's Office, specifically rejecting the claim that the law was undemocratic. After first noting that neither the parties to the case nor the court could find a single decision of this Court "even arguably on point holding a limitation on incumbent succession contrary to the Fourteenth Amendment" (*id.* at 519-20, 223 S.E.2d at 612-13), the court stated:

> Although the incidental effect of restrictive anti-succession provisions may be a limitation on the franchise, in a balancing test which weighs the enlargement of the franchise by guaranteeing competitive primary and general elections against

> the incidental disenfranchisement of those favorably disposed to one individual, the Court must conclude that restrictive provisions on the succession of incumbents does not frustrate but rather furthers the policy of the Fourteenth Amendment.

Id. (citations omitted).

Term limitation achieved by restricting ballot access to longtime incumbents is popularly supported by citizens nationwide and, as evidenced by passage of I-573, is similarly supported by the electorate of Washington. This support is justified by the numerous benefits from term limitation. Because term limits would pass even the more stringent test of advancing a compelling state interest, *a fortiori*, it would pass constitutional muster under the proper *Anderson* balancing test. Unfortunately, the Western District of Washington Court failed to grasp the discrete inquiries involved in the analysis of the Qualifications Clauses and the First Amendment issues. The court below used ballot access cases decided on First and Fourteenth Amendment grounds to determine whether or not Initiative 573 imposed additional qualifications for federal office, then bootstrapped the actual First and Fourteenth Amendment issues onto its first conclusion, holding that because the initiative imposed a qualification, it was also invalid under the First and Fourteenth Amendments. This analysis only confuses the two separate issues and conflicts with the state Supreme Court decisions upholding term limits and ballot access measures on First and Fourteenth Amendment grounds. For this reason, the petition for writ of certiorari should be granted and the decision of the Western District of Washington Court should be reversed.

IV

THE DECISION BELOW CONFLICTS WITH FEDERAL CASE LAW INTERPRETING BALLOT ACCESS MEASURES UNDER THE FIRST AND FOURTEENTH AMENDMENTS

As discussed above, this Court's decision in *Anderson v. Celebrezze* requires that courts use a balancing test to determine whether a ballot access restriction violates the First and Fourteenth Amendments. *See supra* at 15. Circuit Courts of Appeals have uniformly applied this Court's *Anderson* balancing test in construing ballot access initiatives. A sample of these opinions from a variety of circuits includes: *Lightfoot v. Eu*, 964 F.2d 865 (9th Cir. 1992) (petition requirement); *Stiles v. Blunt*, 912 F.2d 260 (8th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991) (age requirement); *Zielasko v. Ohio*, 873 F.2d 957 (6th Cir. 1989) (mandatory judicial retirement law); *Libertarian Party of Maine v. Diamond*, 992 F.2d 365 (1st Cir. 1993) (methods by which a "new political party" qualifies for ballot); *Larouche v. Kezer*, 990 F.2d 36 (2d Cir. 1993) (1% petition requirement and "media recognition" requirement for primary ballot); *Valenti v. Mitchell*, 962 F.2d 288 (3d Cir. 1992) (nominating petition requirement for primary ballot); *Hatten v. Rains*, 854 F.2d 687 (5th Cir. 1988) (judicial mandatory retirement law); and *Thournir v. Meyer*, 909 F.2d 408 (10th Cir. 1990) (one-year nonaffiliation statute).

In each of these cases, in which a potential candidate was prohibited from having his or her name preprinted on the ballot or forbidden from running for office altogether, the ballot access measures were upheld against challenges based on the First and Fourteenth Amendment. The District Court, although it recited the *Anderson* test, did not apply it to the

provisions of I-573. Instead, the court appears to have bootstrapped from its decision on the Article I qualifications issue and determined that any qualification necessarily violates the First and Fourteenth Amendments as well. This refusal to examine the initiative within the analytical framework set forth by this Court and uniformly applied throughout the Circuit Courts of Appeals demonstrates the tremendous conflict that exists between the opinion below and generally accepted First and Fourteenth Amendment jurisprudence.

V

THE DECISION BELOW CONFLICTS WITH FEDERAL AND STATE CASE LAW DEFINING THE QUALIFICATIONS OF FEDERAL OFFICEHOLDERS

This Court has never stated a test to determine whether a restriction amounts to a qualification within the meaning of the Qualifications Clauses. Only *Storer v. Brown* mentioned the Qualifications Clause and then only in passing. This Court disposed of the candidates' claims that the disaffiliation requirement added a qualification by noting simply that the claim was "wholly without merit." *Storer*, 415 U.S. at 746 n.16. This Court went on to explain that "the nonaffiliation requirement no more establishes an additional requirement for the Office of Representative than the requirement that the candidate win the primary to secure a place on the ballot or otherwise demonstrate substantial community support." *Id.* The paucity of Supreme Court jurisprudence on this issue has led Courts of Appeals to address the definitional problem on their own.

The First Circuit addressed this definitional problem in *Hopfmann v. Connolly*, 746 F.2d 97, 103 (1st Cir. 1984),

vacated on other grounds, 471 U.S. 459 (1985).[4] The plaintiff in that case challenged a political party rule that only candidates with 15% of the vote at convention may challenge the convention's endorsement in a state primary. The court held that this rule did not add a qualification for office beyond age, residency, or citizenship. Rather, it adds a restriction on who may run in the party primary for statewide political office and potentially become the party's nominee. The court emphasized that the candidate was free to run as a write-in. *Id.* The First Circuit held that the test to determine whether or not the "restriction" amounts to a "qualification" within the meaning of Article I, Section 3, is whether the candidate "'could be elected if his name were written in by a sufficient number of electors.'" *Hopfmann*, 746 F.2d at 103.

The *Hopfmann* case was favorably cited in *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821, 832 (N.D. Ga. 1993). That case arose from former Senator Wyche Fowler's defeat at the hands of Paul Coverdell in a run-off election. Although Fowler himself did not bring suit, a "consumer" organization along with four Fowler supporters sued to overturn Georgia's "majority rule" statute. *Id.* at 824. This statute requires that a candidate must receive a majority of votes cast (instead of a plurality) to be declared the winner. Fowler had won a plurality in the general election but lost the run-off election. *Id.* at 823-24. Addressing the Qualifications Clause argument, the court first noted that, based on *Hopfmann's* analysis, Fowler was not precluded from obtaining the office he sought--he simply had to participate in the run-off. *Public Citizen*, 813 F.

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[4] On remand, the First Circuit stated that its earlier decision on this issue remained undisturbed by the Supreme Court. *Hopfmann v. Connolly*, 769 F.2d at 25 n.1.

Supp. at 832. Moreover, the *Public Citizen* court found that the majority vote statute does not violate the Qualifications Clause because "the majority vote statute is more accurately interpreted as a method for construing the meaning of the votes cast." *Id.* at 833. That is, it was construed as regulating the "manner" of elections as provided by Article I, Section 4, of the Constitution.

In *O'Sullivan v. Swanson*, 257 N.W. 255 (Neb. 1934), the Nebraska Supreme Court addressed a statute which prohibited unsuccessful primary candidates from having their names placed on the general election ballot for any state or federal office. The court upheld the law against a challenge from a candidate whose name was not printed on the ballot for United States Senate because he had lost at a primary election for governor during the same election the Senate primary was held. *Id.* at 255-56. The court upheld the statute because it did not prohibit O'Sullivan from running for the office: he was permitted to conduct a write-in campaign. *Id.* at 256. Such might have been a strong practical deterrent to election, but nonetheless, he could run, and the statute was upheld.

All of these cases conflict with the decision of the Western District of Washington Court. The cases above all found that when a candidate may serve if elected, any ballot access restriction which may make the candidacy more difficult to maintain will not be construed as a "qualification." The District Court, while recognizing that an incumbent would be seated if he or she earned the most votes in an election or if he or she was appointed to the office, still decided that the ballot access restrictions were "practical" qualifications. App. at A-26. The District Court's apparent test of a qualification--whether a provision makes it more difficult for a candidate to win--directly conflicts with the more stringent tests applied in the cases

above. To remedy this conflict, this Court should grant this petition for writ of certiorari and reverse the decision of the District Court.

CONCLUSION

This case presents the fundamental questions of whether the People of this country retain the power to determine the manner in which their representatives in Congress will be chosen. For too long, Americans have watched the legislative branch of government become a perpetual reelection machine for the benefit of the incumbents who have made politics their career. In the past few years, over a dozen states have passed legislation regulating elections for Congress in a way that will ensure more competitive races and more truly representative and accountable members of Congress. Incumbents have pulled no punches in their efforts to overturn the People's will in this area. Unsuccessful at the ballot box, the incumbents turn to the courts. Without an immediate resolution of this critical national issue by this Court, lower courts are left without

guidance to determine these fundamental questions of American governance. For the reasons above, this petition for writ of certiorari should be granted.

DATED: May, 1994.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SUSAN THORSTED; WILLIAM FIRST; and TIMOTHY S. ZENK, Plaintiffs, v. CHRISTINE O. GREGOIRE; and RALPH MUNRO, Defendants, and SHERRY BOCKWINKEL; LIMIT; CITIZENS FOR TERM LIMITS; U.S. TERM LIMITS; ALAN M. GOTTLIEB; LEE GILL; and WILBUR B. McPHERSON, Intervenor Defendants.	Filed 2/10/94 NO. C92-1763WD ORDER ON DISPOSITIVE MOTIONS
MARGARET COLONY; LEAGUE OF WOMEN VOTERS OF WASHINGTON; GEORGE CHEEK; JOHN CLUTE; and THOMAS FOLEY, Plaintiffs, v.	

RALPH MUNRO; and CHRISTINE O. GREGOIRE, Defendants, and SHERRY BOCKWINKEL; LIMIT; CITIZENS FOR TERM LIMITS; U.S. TERM LIMITS; ALAN M. GOTTLIEB; LEE GILL; and WILBUR B. McPHERSON, Intervenor Defendants.	)	NO. C93-770WD

I. INTRODUCTION

These consolidated cases are of fundamental importance to the structure of representative government in the United States. At issue is the constitutionality of a state law designed to prevent incumbents who have served for a specified number of years from winning re-election to the United States Senate or House of Representatives.

On November 3, 1992, the voters of the State of Washington approved Initiative Measure 573 by a margin of about fifty-two to forty-eight percent. (The measure failed by a similar margin, in the state's Fifth Congressional District, represented by plaintiff Thomas Foley, who is Speaker of the House of Representatives.) Under Article II, 1 and 1A of the Washington Constitution, Initiative 573 became law thirty days after its passage, and is now codified at Revised Code of Washington ("RCW") Ch. 29. It provides in relevant part:

> Sec. 4. A new section is added to chapter 29.68 RCW to read as follows:
>
> No person is eligible to appear on the ballot or file a declaration of candidacy for the United States house of representatives who, by the end of the then current term of office will

> have served, or but for resignation would have served, as a member of the United States house of representatives during six of the previous twelve years.
>
> Sec. 5. A new section is added to chapter 29.68 RCW to read as follows:
>
> No person is eligible to appear on the ballot or file a declaration of candidacy for the United States senate who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the United States senate during twelve of the previous eighteen years.

Other sections provide that the Washington Secretary of State shall not accept a declaration of candidacy from a person who "is ineligible for the office" under the Initiative, nor allow such person's name to appear on the ballot (Section 7): that one who is ineligible to appear on the ballot or file a declaration of candidacy may run a write-in campaign (Section 6); that no terms or years served in office before November 3, 1992, may be used to determine eligibility (Section 7); and that Sections 4 and 5, regarding candidates for federal legislative office, are not effective until at least nine other states have passed similar measures (Section 7). The latter condition has been met.

The full text of Initiative 573 is set out in Appendix A to this order. Only the parts governing candidacies for the two houses of Congress are challenged here; no ruling on the provisions relating to State of Washington offices is sought or made.

The plaintiffs, who are or represent registered voters in Washington, and one of whom is a member of the House of Representatives, allege that Initiative 573's restrictions on candidacies for Congress are invalid under Article I, §§ 2 and 3, of the United States Constitution, and under the First

and Fourteenth Amendments. They seek a declaratory judgment and an order enjoining defendants Ralph Munro and Christine Gregoire, the Washington Secretary of State and Attorney General, from enforcing those provisions. Plaintiffs also seek relief for an alleged deprivation of their civil rights under 42 U.S.C.§ 1983 and 1988. The two State officers who are defendants, and the intervenor defendants (Sherry Bockwinkel, LIMIT, U.S. Term Limits, Alan M.Gottlieb, Lee Gill, Wilbur B. McPherson, and Citizens for Term Limits), seek judgment upholding the constitutionality of Initiative 573 and denying any relief to plaintiffs. A variety of amici curiae have filed briefs.[1]

This court has jurisdiction under 28 U.S.C. § 1331. All parties have moved for summary judgment and/or for dismissal. The motions for dismissal are treated as summary judgment motions because matters outside the pleadings have been presented. Fed. R. Civ. P. 12(b)(6). There is no genuine issue of material fact for trial, and the case may be resolved on the motions under Fed. R. Civ. P. 56.

The briefs of all parties and friends of the court have been fully considered, as have the arguments of counsel given in open court at a hearing held on January 11, 1994.

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[1] Amici curiae contending that Initiative 573 is unconstitutional are Rep. Henry J. Hyde (R-Ill.) and the American Civil Liberties Union of Washington Foundation. Arguing in favor of constitutionality are the Washington Legal Foundation; Taxpayers United for Term Limits; Citizens United Foundation; Ronald D. Rotunda; and Wallace M. Rudolph.

II . ELEVENTH AMENDMENT

These actions are brought against the Washington Secretary of State and Attorney General, who are responsible for implementing and enforcing Initiative 573. Although the Eleventh Amendment prohibits suits in federal court against a state without the state's consent, see Hans v. Louisiana, 134 U.S. 1 (1890), it does not bar actions to enjoin state officials from enforcing an unconstitutional law. Ex Parte Youna, 209 U.S. 123 (1908); San Francisco County Democratic Central Comm. v. Eu, 826 F.2d 814, 824-25 (9th Cir. 1987), aff'd, 489 U.S. 214 (1989).[2]

III. STANDING AND RIPENESS

The plaintiffs, supported by intervenor defendants Sherry Bockwinkel and LIMIT, and by some of the amici curiae, contend that plaintiffs have standing to sue and that the constitutional challenge is ripe for decision. The State defendants, supported by intervenor defendant U.S. Term Limits and by some of the amici curiae, contend that standing is absent and the case is not justiciable, i.e., is not ripe for decision.

A. Standing

There are eight plaintiffs. In the Colony case, Thomas Foley, who has represented the Fifth Congressional District

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[2] By a separate order entered today, an unopposed motion in the Thorsted case to dismiss that action as against the State of Washington, defendants Munro and Gregoire in their personal capacities, and the spouses of the two State officials named as defendants, is granted. The Colony plaintiffs have named only the Washington Secretary of State and Attorney General as defendants.

of Washington in Congress since 1965, declares that he plans to continue serving if the voters re-elect him. Initiative 573, if valid, will bar him from the ballot in 1998. Margaret Colony, a registered voter in the State's Eighth Congressional District, claims injury to her right to vote for constitutionally qualified candidates of her choice. The League of Women Voters of Washington, a civic organization, asserts representational standing for its member-voters. George Cheek is a registered voter in the Fifth District who intends to vote for Congressman Foley. John Clute, dean of the Gonzaga University School of Law, is also a registered voter in the Fifth District. In the Thorsted case, plaintiffs Susan Thorsted, William First, and Timothy S. Zenk are registered voters in Washington.

The plaintiffs allege injury to their rights as voters and/or as candidates, and to their rights of free association and political expression. Some assert standing based upon harm to public projects that are being supported by certain incumbents. The latter category need not be analyzed because plaintiff Foley's standing as a member of Congress who plans to seek re-election, and the other plaintiffs' standing as registered voters, are enough.

The Supreme Court has listed three elements of standing to sue: the plaintiff must have suffered an "injury in fact" (an invasion of a legally-protected interest which is "concrete and particularized" and is "actual or imminent"); there must be a "causal connection" between the injury and the conduct complained of; and it must be "likely," and not merely "speculative," that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992).

The Court in Lujan held that if "the plaintiff is himself an object of the [government] action . . . at issue . . . there is ordinarily little question that the action . . . has caused him injury." Id. at 2137. Congressman Foley is

clearly an "object" of Initiative 573; the measure, if enforced, will bar him from the ballot in the future. Like the plaintiffs in Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979), he has demonstrated a "realistic danger of sustaining a direct injury as a result of the [challenged] statute's operation or enforcement."

If one plaintiff has standing, it does not matter whether the others do. Bowsher v. Synar, 478 U.S. 714, 721 (1986); Watt v. Energy Action Educ. Found., 454 U.S. 151, 160 (1981); Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 264 n.9 (1977).

In this case, however, the voter plaintiffs have standing as well. The Supreme Court has held that Article I, Section 2 of the Constitution "gives persons qualified to vote a constitutional right to vote and to have their votes counted." Wesberry v. Sanders, 376 U.S. 1, 17 (1964). "No right," said the Court,

> is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Id. at 17-18.

It is true, as defendants point out, that a voter "does not have a fundamental right to vote for any particular candidate." Burdick v. Takushi, 927 F.2d 469, 473 (9th Cir. 1991), aff'd, 112 S. Ct. 2059 (1992). But each voter does have a right to choose among candidates placed on the ballot without unconstitutional exclusions or restrictions.

The rights of voters and those of candidates are related and "do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." Anderson v. Celebrezze, 460 U.S. 780, 786 (1983), quoting Bullock v. Carter, 405 U.S. 134, 143 (1972). In Anderson and Bullock, the Court allowed suits by voter plaintiffs or intervenors challenging state ballot access requirements.

The Ninth Circuit, interpreting Anderson, has upheld voter standing to challenge a candidate eligibility requirement since "basic constitutional rights of voters as well as those of candidates" are implicated. Erum v. Cayetano, 881 F.2d 689, 691 (9th Cir. 1989), citing Baker v. Carr, 369 U.S. 186, 206 (1962). The Circuit has also upheld a voter's standing to challenge a state election law write-in provision. Burdick, 927 F.2d at 472.

Initiative 573 would prevent the plaintiffs from casting their votes for any candidate barred from the ballot under its provisions except through a burdensome write-in procedure. The Supreme Court has held that a write-in opportunity "is not an adequate substitute for having the candidate's name appear on the printed ballot." Anderson, 460 U.S. at 499 n.26, citing Lubin v. Panish, 415 U.S. 709, 719 n.5 (1974). This threatened injury is enough to confer standing; the plaintiffs are not required to wait until the injury has actually occurred. Babbitt, 442 U.S. at 298; Idaho Conservation League v. Mumma, 956 F.2d 1508, 1515 (9th Cir. 1992).

The League of Women Voters of Washington has representational standing to sue for its voter-members. Warth v. Seldin, 422 U.S. 490, 511 (1975); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 342-43 (1977).

B. Ripeness

Under the doctrine of ripeness, federal courts refrain from deciding "abstract disagreements" that might never become real disputes. See Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580-81 (1985). Ripeness is largely a question of timing, id. at 580, and the court must look to "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967), overruled on other grounds, Califano v. Sanders, 430 U.S. 99 (1977).

Fitness for judicial decision may be found where the plaintiffs have standing and the issue "is a purely legal one," as with construction of a statute. Id. See also Union Carbide, 473 U.S. at 581; Trustees for Alaska v. Hodel, 806 F.2d 1378, 1381 (9th Cir. 1986); Helm v. California, 722 F.2d 507 (9th Cir. 1983); Friedman Bros. Inv. Co. v. Lewis, 676 F.2d 1317, 1319 (9th Cir. 1982).

The questions raised here are purely legal: whether a state may add qualifications for election to Congress beyond those listed in Article I, Sections 2 and 3; if not, whether Initiative 573 imposes further qualifications; and whether plaintiffs' rights under the First and Fourteenth Amendments are violated. The record is complete. The constitutional issues will not disappear, and to postpone deciding them would accomplish nothing. See Union Carbide, 473 U.S. at 581; Duke Power Co. v. Carolina Environmental Study Groups, Inc., 438 U.S. 59, 81 (1978); cf. Renne v. Geary, 111 S. Ct. 2331 (1991) (further opportunity for the state courts to interpret the statute might alter the question presented).

As for hardship to the parties, the plaintiffs and intervenor defendants Bockwinkel and LIMIT have shown that they would be substantially harmed by delay. In the face

of uncertainty about whether Initiative 573 will stand, plaintiff Foley is unable to plan whether to run again beyond the 1996 election. Even if he decides to run, until this matter is resolved he cannot know how to run -- whether to wait until 1998 to campaign in the customary way, or to embark sooner on a long-range effort to overcome the ballot-exclusion barrier. The voter plaintiffs are deprived of information they need in deciding which candidates to support, when to begin supporting them, and by what methods. LIMIT, selfdescribed as a temporary organization, is forced to try to prolong its existence and solvency for as long as necessary to defend its position. Ms. Bockwinkel is an organizer and leader of LIMIT. As an official sponsor of the initiative, LIMIT has a judiciallyrecognized interest in seeking to have it upheld. See RCW 29.79.010 and Yniguez v. Arizona, 939 F.2d 727, 733 (9th Cir. 1991).

The Supreme Court has described the importance of deciding a challenge to the constitutionality of an election law before it takes effect:

> Though waiting until [plaintiffs] invoke unsuccessfully the statutory election procedures would remove any doubt about the existence of concrete injury resulting from application of the election provision, little could be done to remedy the injury incurred in the particular election. Challengers to election procedures often have been left without a remedy in regard to the most immediate election because the election is too far underway or already consummated prior to judgment. . . . Justiciability in such cases depends not so much on the fact of past injury but on the prospect of its occurrence in an impending or future election.

Babbitt, 442 U.S. at 300 n.12. See also Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 226 (7th Cir. 1993); Sianorelli v. Evans, 637 F.2d 853, 858 (2nd Cir. 1980).

To put off a court test of Initiative 573 until 1997 or 1998 would not only inflict uncertainty on the parties and the public, but would risk a failure to complete review by the Ninth Circuit, and perhaps by the Supreme Court, before the ostensible winners of the 1998 election are sworn into office. See Joyner v. Mofford, 706 F.2d 1523, 1527 (9th Cir. 1983), cert. denied, 464 U.S. 1002 (1983).

The case is ripe for adjudication, and the constitutional issues must be decided.

IV. CONSTITUTIONALITY

A. State Legislation and the Constitution

The parties have expressed fervent beliefs for and against term limits for members of Congress. The proponents say that long-term incumbents become indifferent to the well-being of the people, preoccupied with re-election, aligned with special interest groups, hard to dislodge because they hold a great advantage in fund-raising, and resistant to any change that would level the playing field. The opponents say that there is in fact a large and steady turnover in congressional membership, voters should be free to re-elect good representatives, the way to end a political career is simply to defeat the incumbent at the polls, and term limits would weaken the national legislature. These arguments are important in a policy debate but cannot determine the legal issues. Whether congressional term limits are wise or foolish is not for the courts to decide. The nation could adopt them by amending the Constitution, as it did in limiting the President to two elected terms in the Twenty-Second Amendment, ratified in 1951. The question is whether a state

may adopt them in the absence of a federal constitutional amendment.

A state statute that violates the United States Constitution must be held invalid. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

In Washington the initiative process is a way "to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature . . . ." Wash. Const., art. II, 1. An initiative is tested by the same constitutional standards as a bill adopted by the legislature. As the Supreme Court held in Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981):

> It is irrelevant that the voters rather than a legislative body enacted [the statute], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation.

Id. at 295.[3]

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[3] Several Washington initiatives have been declared unconstitutional by federal courts. See Continental Ill. Nat'l Bank v. State of Washington, 696 F.2d 692 (9th Cir. 1983) (Initiative 394 regulating WPPSS financing held unconstitutional under Contract Clause); Washington State Building & Construction Trades Council v. Spellman, 518 F. Supp. 928 (E.D. Wash. 1981), aff'd 684 F.2d 627 (9th Cir. 1982) (Initiative 383 prohibiting shipment of nuclear waste to Washington held unconstitutional under Supremacy and Commerce Clauses); Seattle School Dist. No. 1 v. State of Washington, 473 F. Supp. 996 (W.D. Wash. 1979), aff'd in part, rev'd in part, 633 F.2d 1338 (9th Cir. 1980), aff'd,

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B. The Qualifications Clauses

The first challenge to Initiative 573 is brought under the Qualifications Clauses. Article I, Section 2 of the Constitution provides in part:

> No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Article I, Section 3 provides in part:

> No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The defendants contend that these provisions list only the minimum qualifications for the House and Senate, and that a state may add to them.

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[3] (...continued)
458 U.S. 457 (1982) (Initiative 350 limiting school busing held unconstitutional under Equal Protection Clause); Spokane Arcades, Inc. v. Ray, 449 F. Supp. 1145, 1158 (E.D. Wash. 1978) (Initiative 335 dealing with obscenity held unconstitutional under First Amendment).

1. The Powell Case

The Supreme Court in Powell v. McCormack, 395 U.S. 486 (1969), held that the Article I qualifications for election-age, citizenship, and residency -- cannot be added to by Congress.

Powell arose from an attempt by the House of Representatives to exclude a re-elected member from New York, found by a majority of his colleagues to have engaged in financial misconduct. The member sued, claiming that since he possessed the qualifications listed in Article I, Section 2, the House had no authority to deny him his seat. The Court agreed, holding that Congress is "without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution." Id. at 522 (emphasis in original).

Although Section 2 is phrased in the negative -- "No Person shall . . . ." -- the Court found it equivalent to a positive list of qualifications. Id. at 537-39.

The narrow holding of Powell defined Congress's power under Article I, Section 5, which provides that "[e]ach House shall be the Judge of the Elections, Returns, and Qualifications of its own members . . . ." But in reaching its result the Court marshaled the historical and legal precedents showing that neither Congress nor the states can add to the Article I, Sections 2 and 3, qualifications. It referred to "the Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution." Id. at 540. It quoted, among other sources, Alexander Hamilton's reply to an antifederalist charge that the new Constitution would favor the wealthy:

> "The qualifications of the persons who may choose or be chosen, as has been

> remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature."

Id. at 539, quoting The Federalist Papers 371 (Mentor ed. 1961) (emphasis omitted).

The Court quoted, as well, James Madison's statement that, "'[t]he qualifications of the elected . . . have been very properly considered and regulated by the [constitutional] convention.'" Id. at 540 n.74, quoting The Federalist Papers 326 (Mentor ed. 1961).

And the Court quoted an 1807 report by the House Committee of Elections recommending that a member be seated despite his failure to meet additional state-imposed residency requirements:

> "The committee proceeded to examine the Constitution, with relation to the case submitted to them, and find that qualifications of members are therein determined, without reserving any authority to the State Legislatures to change, add to, or diminish those qualifications; . . . ."

Id. at 542, quoting 17 Annals of Cong. 871 (1807).

The Powell Court concluded that "in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution." Id. at 550.

2. Pre- and Post-Powell Decisions Under the Qualifications Clauses

For many years, before and after Powell, courts have held that the states, like Congress, are without power to add

substantive requirements for election to Congress to those set forth in the Qualifications Clauses. In Joyner v. Mofford, 706 F.2d at 1528, the Ninth Circuit stated:

> From the beginning of the Republic, commentators have asserted that the three qualifications contained in the Clause -- age, citizenship, and residency -- are exclusive, and that neither Congress nor the states may require more of a candidate. See, e.g., 1 J. Story, Commentaries on the Constitution 453-63 (5th ed. 1891). In Powell v. McCormack, 395 U.S. 486, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969), the Supreme Court accepted this restrictive view of the Qualifications Clause -- at least as applied to Congress -- and held that members of Congress may not set extra-constitutional qualifications for taking a seat in the House of Representatives. In addition, as the district court observed in the present case, the same principle has frequently been applied to state laws imposing additional qualifications on candidates for federal office. 539 F. Supp. at 1121-22 & n.1.

See also Public Citizen, Inc. v. Miller, 813 F. Supp. 821, 831 (N.D. Ga. 1993) ("Although Powell did not address states' power to add qualifications for membership in the House of Representatives, courts agree that states are similarly denied the power to act in this area") (emphasis in original), aff'd mem., 992 F.2d 1548 (11th Cir. 1993); United States v. Richmond, 550 F. Supp. 605, 607 (E.D.N.Y. 1982) ("the states are barred from imposing additional qualifications on congressional candidates"); Dillon v. Fiorina, 340 F. Supp. 729, 731 (D.N.M. 1972) ("That a state cannot add to or take away from these [Article I] qualifications is well settled," invalidating

two-year district residency requirement); Exon v. Tiemann, 279 F. Supp. 609, 613 (D. Neb. 1968) ("There being no such requirement in the Constitution itself, a state cannot require that a Representative live in the District from which he was nominated").

Among the many state court decisions reaching the same conclusion are State ex rel. Chandler v. Howell, 104 Wash. 99, 175 P. 569, 570 (1918) ("So long as a candidate for membership in Congress meets the requirements set forth in the constitution which created the office, no state has the right or authority to prevent his candidacy, either by provisions in its constitution or in its statutes"); Application of Ferguson, 294 N.Y.S.2d 174 (N.Y. Sup. Ct.), aff'd, 294 N.Y.S.2d 989 (App. Div. 1968) (disqualification of candidate convicted of a felony held invalid); Shub v. Simpson, 76 A.2d 332 (Md.) (anti-subversion declaration requirement held unconstitutional), appeal dismissed, 340 U.S. 881 (1950); Strong v. Breaux, 612 So. 2d 111, 112 (La. App. 1992) ("The qualifications prescribed by [Article I, Section 3] are exclusive and neither a state constitution nor state law can add to nor take away from such qualifications").[4]

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[4] The Washington legislature appears to have recognized that the state cannot add qualifications for Congress to those set forth in Article I. RCW 29.15.025 requires that "[t]he name of a candidate for an office shall not appear on a ballot for that office unless the candidate is . . . properly registered to vote in the geographic area represented by the office," but adds: "This section does not apply to the office of a member of the United States Congress." Thus, while the declaration of candidacy form includes a "place for the candidate to declare that he or she is a registered voter within the jurisdiction of the office for which he or she is filing," RCW 29.15.010(1), such a declaration need not be made by

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3. The Constitutional Freedom to Choose Governmental Representatives

The cases holding that neither the states nor Congress may add to the Article I qualifications for service in Congress all rest on the same foundation: the constitutional right of voters in the United States to elect legislators of their choice. The Powell Court said:

> A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them." 2 Elliot's Debates 257. As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself.

395 U.S. at 547.

The Court in Powell repeatedly mentioned this basic freedom:

> "That the right of the electors to be represented by men of their own choice, was so essential for the preservation of all their other rights, that it ought to be considered as one of the most sacred parts of our [English] constitution."

395 U.S. at 534 n.65, quoting 16 Parl. Hist. Eng. 589-90 (1769).

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[4] (...continued)
a candidate for Congress.

> "Under these reasonable limitations [of Article I], the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession or religious faith."

Id. at 540 n.74, quoting Madison, The Federalist Papers 326 (Mentor ed. 1961).

> "[T]he true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed."

Id. at 540-41, quoting Hamilton, 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876) (hereinafter cited as "Elliot's Debates").

> "It has ever been considered a great security to liberty, that very few should be excluded from the right of being chosen to the legislature. This Constitution has amply attended to this idea. We find no qualifications required except those of age and residence, which create a certainty of their judgment being matured, and of being attached to their state." Id. at 541, quoting Wilson Carey Nicholas, 3 Elliot's Debates 8. As Powell, Joyner, and the other authorities cited above make clear, the voters' freedom to choose

federal legislators must not be abridged by laws that make qualified persons ineligible to serve.

4. Term Limit Laws and Freedom of Choice

If adopted as a complete bar to re-election, a term limits law would exclude a category of candidates qualified under Article I: those who have served for a certain time. It would allow a bare majority of those voting in a current year to prevent, say, eighty percent in a later year from electing a candidate of their choice.[5]

Term limits for members of Congress, like the property ownership qualification which many urged at the time, were considered by the Framers of the Constitution. A number of states had imposed term limits on members of their legislatures. Under the Articles of Confederation, delegates to Congress could not serve "for more than three years in any term of six years; . . . ." Art. Conf. V (1777). The phrase "rotation in office" was current then as it is now. By 1787 these efforts were widely seen as a failed experiment.[6] On June 12, 1787, the Constitutional Convention voted unanimously to reject congressional term limits. See 1 Max Farrand, The Records of the Federal Convention

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[5] These figures are not entirely hypothetical. The late Henry M. Jackson of Washington, who served twelve years in the House and thirty in the Senate before dying in office in 1983, won re-election with an eighty-two percent statewide majority in 1970, and often won more than two-thirds of the vote. See Official Abstract of Votes, State of Washington.

[6] See Gordon S. Wood, The Creation of the American Republic, 1776-1787 (1969) at 140-41, 398-99, 436-38, 477.

of 1787 (1937) 217; Supplement to Max Farrand's The Records of the Federal Convention of 1787 (James H. Hutson ed., 1987) 71.

In adopting a short but comprehensive list of qualifications for Congress -- age, citizenship, and residency ---the Framers protected the "indisputable right [of the people] to return whom they thought proper" to the legislature. Powell, 395 U.S. at 535, quoting 16 Parl. Hist. Eng. 589.

In a political climate different from today's, a state's voters -- or its legislature -- might believe that age brings wisdom, government experience brings knowledge, and long-term incumbency brings power in the nation's capital. The state might therefore adopt an experience requirement: only those presently serving in Congress, or with at least two years of service in Congress or in the state legislature, would be eligible for election to the federal House or Senate. This method of "going through the chairs" could be presented as thoroughly democratic, since anyone could run for the state legislature. But to bar those without legislative experience from serving in Congress would be plainly unconstitutional under Article I, Sections 2 and 3. And just as experience in government cannot be added as a qualification, neither can inexperience. A state may not diminish its voters' constitutional freedom of choice by making would-be candidates for Congress ineligible on the basis of incumbency or history of congressional service.[7]

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[7] See, for a variety of views, the law review articles listed in Appendix B to this order. See also Stumpf v. Lau, 839 P.2d 120, 123 (Nev. 1992) ("The [Nevada] term limits initiative clearly and 'palpably' violates the qualifications clauses of Article I of the United States Constitution"). Such holdings under Article I, Sections 2 and 3, of course, relate

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5. Initiative 573 and the Qualifications Clauses

While the Constitution bars the states from imposing substantive restrictions on who may be elected to Congress, it permits reasonable state regulation of how elections are conducted. Article I, Section 4, provides in part:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations

It is argued that Initiative 573 is not a term limits law but a ballot access measure, and as such is constitutional under Section 4. The Initiative does not impose a total ban on reelection. While barring the targeted incumbents from the ballot in order to cause their defeat (or their decision not to run), it leaves open a pinhole of opportunity: a barred incumbent may run a write-in campaign.

The Washington election code provides that a candidate who desires to have his or her name printed on the ballot for Congress must file a declaration of candidacy. RCW 29.15.010. One who seeks to be a write-in candidate may file a declaration of candidacy not later than the day

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[7] (...continued)
to the federal legislature. Term limits applicable to state offices are tested not under Article I but under state constitutional law and under the First and Fourteenth Amendments to the United States Constitution. See, e.g., Miyazawa v. City of Cincinnati, 825 F. Supp. 816 (S.D. Ohio 1993); Legislature v. Eu, 816 P.2d 1309 (Cal. 1991), cert. denied, 112 S. Ct. 1292 (1992).

before the election. RCW 29.04.180. If such a declaration has been filed, voters may write in the candidate's name at the appropriate place on the ballot; absent a filed declaration, one voting for a candidate not on the ballot "must designate the office sought and position number or political party, if applicable." Id. Whether a vote will be counted turns on the Canvassing Board's ability to discern the voter's intent. RCW 29.51.170. Initiative 573 makes incumbents with the specified length of service "ineligible to appear on the ballot or file a declaration of candidacy." Appendix A, Sections 4, 5, and 7.

The measure will thus keep barred incumbents off the ballot no matter what they do.

If this restriction is a state-imposed qualification for congressional office, it must be held invalid under Article I, Sections 2 and 3. If it does not impose a new qualification, then its constitutionality as a ballot access measure is tested by different standards.

The Supreme Court has recognized that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730 (1974). It has, accordingly, "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1982).

Among the cases upholding state ballot access laws on this basis are Storer, 415 U.S. at 733 (law denying ballot position to independent candidates who had a registered affiliation with a political party within one year prior held "expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot" and to involve "no discrimination against independents"; American Party v.

White, 415 U.S. 767 (1974) (petition requirement for independents and minor parties); Hopfmann v. Connolly, 746 F.2d 97 (1st Cir. 1984), vacated in part on other grounds, 471 U.S. 459 (1985) (party requirement that candidates receive fifteen percent of the vote at the convention in order to be included on the ballot in the state primary election); Public Citizen, Inc. v. Miller, 813 F. Supp. 821 (N.D. Ga. 1993) (law requiring a run-off election for Congress), aff'd per curiam, 992 F.2d 1548 (11th Cir. 1993); Williams v. Tucker, 382 F. Supp. 381 (M.D. Pa. 1974) (statute preventing candidate from contemporaneously filing nomination papers and running in primary); Clark v. Rose, 379 F. Supp. 73 (S.D.N.Y. 1974) (statute requiring authorization of party's state committee for non-member of party to run in its primary), aff'd, 531 F.2d 56 (2nd Cir. 1976); Fowler v. Adams, 315 F. Supp. 592 (M.D. Fla. 1970) (statute requiring candidates to pay a filing fee), appeal dismissed, 400 U.S. 986 (1971).

But the law recognizes that fundamental rights under the First and Fourteenth Amendments are affected by ballot access measures. In Williams v. Rhodes, 393 U.S. 23, 30 (1968), the Supreme Court struck down a state statute that imposed onerous petition requirements on small parties seeking ballot access, and stated:

> In the present situation the state laws place burdens on two different, although overlapping, kinds of rights -the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.
>
> Both of these rights, of course, rank among our most precious freedoms.

It "is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." NAACP v. Alabama, 357 U.S. 449, 460 (1958). A law that excludes candidates from the ballot "burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." Anderson, 460 U.S. at 787-88. As for candidates' rights, although reasonable regulations may be imposed, "[t]he right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters." Lubin, 415 U.S. at 716.

The inquiry is "whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity."' Anderson, 460 U.S. at 793, quoting Clements v. Fashing, 457 U.S. 957, 964 (1982), and Lubin, 415 U.S. at 716. On this basis, unduly restrictive ballot measures have been held unconstitutional as violating the First and Fourteenth Amendment rights of voters and candidates. See, e.g., Anderson, supra (early filing requirement for independent candidates for President, without comparable requirement for party candidates); Norman v. Reed, 112 S. Ct. 698 (1992) (requirement that more signatures be obtained to appear on local ballot than were required to appear on statewide ballot); Tashjian v. Republic Party, 479 U.S. 208 (1986) (requirement that party hold primary open only to its members); Lubin, supra (excessive filing fees).

The state election laws that have been upheld have been general ground rules designed to make elections "fair and honest" and to impose "some sort of order, rather than chaos" on the electoral process, see Burdick v. Takushi, 112 S. Ct. 2059, 2063 (1992), or to prevent "voter

confusion, ballot over-crowding, or the presence of frivolous candidacies," Munro v. Socialist Workers Party, 479 U.S. 189, 194-95 (1986).

All such laws have been open to compliance by candidates who take the necessary steps, or make the required showing, in the election process itself.

Initiative 573, in contrast, is aimed not at achieving order and fairness in the process but at preventing a disfavored group of candidates from being elected at all. The Initiative plainly states its purpose: to get rid of "entrenched incumbents." It aims to prevent "the self-perpetuating monopoly of elective office by a dynastic ruling class." Appendix A, section 1(7). It refers to ballot-barred persons as "ineligible for the office." Id., section 7(2). The statement for it in the "1992 Voters Pamphlet" published by the Secretary of State repeatedly describes it as a "term limits" measure. See Exhibit B to State Defendants' Memorandum in Support of Summary Judgment. It is codified at several places in RCW Ch. 29 under the heading "Initiative Measure 573 -Term Limits."

Denial of ballot access ordinarily means unelectability. The State concedes that no one in its history has been elected to Congress by a write-in vote. The record shows that in the country as a whole only three candidates for the House have been elected by write-in votes since 1958, and only one candidate for the Senate has been elected by that method since 1954.

The Initiative would thus have the practical effect of imposing a new qualification: non-incumbency beyond the specified periods. The intended and probable result would be the same as if the State were to adopt non-incumbency as an absolute requirement.

A state may not do indirectly what the Constitution forbids it to do directly. Frost & Frost Trucking Co. v. Railroad Comm'n of California, 271 U.S. 583, 593-94 (1925). The challenged parts of Initiative 573 must therefore be held to impose additional qualifications for Congress in violation of Article I, Sections 2 and 3.

6. The Resign-to-Run Cases

The resign-to-run cases, cited by both sides, do not suggest that Initiative 573 is constitutional. Those cases arise from laws that require public officials to resign from a state post before running for an elected federal position, or that treat a declaration of candidacy for Congress as an automatic resignation from state office. Some courts have held such provisions unconstitutional as imposing additional qualifications. see State ex rel. Chandler v. Howell, 175 P. 569, 570 (Wash. 1918); State ex rel. Wettenael v. Zimmerman, 24 N.W.2d 504 (Wis. 1946); Stack v. Adams, 315 F. Supp. 1295 (N.D. Fla. 1970). Others have upheld them as valid exercises of a state's power to regulate the conduct of its own officeholders. See Sianorelli v. Evans, 637 F.2d 853 (2nd Cir. 1980); Adams v. Supreme Court of Pa., 502 F. Supp. 1282 (M.D. Pa. 1980); Oklahoma State Election Board v. Coats, 610 P.2d 776 (Okla. 1980); Alex v. County of Los Angeles, 111 Cal. Rptr. 285 (Cal. App. 1973). The Ninth Circuit, reviewing an Arizona constitutional provision that required certain officials to resign as a condition of running for Congress in the final year of their state terms, explained these holdings as follows:

> The courts considering challenges to state laws relying on the Qualifications Clause have distinguished between state provisions which bar a potential candidate from running for federal office, and those which merely regulate the conduct of state officeholders. The former category of laws imposes

> additional qualifications on candidates and therefore violates the Qualifications Clause, while the latter category is constitutionally acceptable since it merely bars state officeholders from remaining in their positions should they choose to run for federal office.

Joyner v. Mofford, 706 F.2d at 1528.

Finding that the Arizona provision "regulates the conduct of state officials" and "merely requires that they not occupy a state office while seeking either a federal or state elective office," the court upheld it as constitutional. Id. at 1531, 1533.

The resign-to-run cases turn on a state's power to regulate its own officials' conduct. That factor is not present here. There is no constitutional basis for a state to require nonservice, or limited prior service, in Congress as a condition of election to the House or Senate.

C. Alternative Ruling Under Article I, Section 4

Even if viewed as an attempt to regulate the electoral process, the federal-office sections of the Initiative would have to be held invalid. Measures lawfully adopted under Article I, Section 4, are designed to "protect the integrity and reliability of the electoral process." Anderson, 460 U.S. at 788 n.9. Ballot-access restrictions "implicate[] basic constitutional rights." Id. at 786. The court must weigh the "character and magnitude of the asserted injury to the right protected by the First and Fourteenth Amendments" and "the precise interests put forward by the State as justifications for the burdens imposed by its rule." Id. at 789. Any "severe restrictions" designed to assure an honest and orderly electoral process must be "narrowly drawn to advance a state interest of compelling importance," Norman v. Reed, 112 S. Ct. 698, 705 (1992), and must be "reasonable [and]

non-discriminatory," Burdick, 112 S. Ct. at 2063-64. "[W]e have repeatedly upheld," said the Burdick Court, "reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." 112 S. Ct. at 2066.

Sections 4 and 5 of Initiative 573 are neither neutral, nor nondiscriminatory, nor narrowly drawn. They seek to determine the outcome, not the procedures. The state interest claimed is to prevent congressional incumbents from winning; but the Constitution places that decision with the voters in each election, not with a state government.

The extent to which a state might try to even a congressional race through neutral measures (such as providing forums or financing for all candidates) is outside the scope of this case. Initiative 573 is not such a measure. Instead, it hobbles a few runners to make sure they lose. A state may not constitutionally do that, just as it may not bar qualified runners from the track.

D. The Ninth and Tenth Amendments

It is argued that, notwithstanding Article I, Sections 2 and 3, the Ninth and Tenth Amendments reserve to the states the power to limit congressional terms. The Ninth Amendment provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

These two amendments are "restrictions upon federal power, intended to prevent interference with the rights of the States and of their citizens." Fox v. Ohio, 46 U.S. (5 How.) 410, 434 (1847). Their very wording shows their inapplicability. The Ninth Amendment assures rights to the people beyond those specifically listed but implies no right to alter the governmental structure established by the Constitution. The Tenth Amendment concerns powers "not delegated to the United States by the Constitution"; it implies no state power to abridge what is delegated to the United States.

Justice Story in his Commentaries spoke to whether the Tenth Amendment reserved any power to the states to add qualifications for Congress:

> [N]o powers could be reserved to the States, except those which existed in the States before the Constitution was adopted. The [tenth] amendment does not profess, and, indeed, did not intend to confer on the States any new powers, but merely to reserve to them what were not conceded to the government of the Union. . . . [W]here did the States get the power to appoint representatives in the national government? Was it a power, that existed at all before the Constitution was adopted? . . .
>
> The truth is, that the States can exercise no powers whatsoever which exclusively spring out of the existence of the national government, which the Constitution does not delegate to them. They have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a President. Each is an officer of the Union, deriving his powers and qualifications

> from the Constitution . . . . It is no original prerogative of State power to appoint a representative, a senator, or President for the Union. Those officers owe their existence and functions to the united voice of the whole, not of a portion of the people. . . . No State can say that it has reserved what it never possessed.

2 J. Story, Commentaries on the Constitution of the United States 626-27 (5th ed. 1891).

The case of Gregory v. Ashcroft, 111 S. Ct. 2395 (1991), relied upon by term limits proponents, concerned a state's power to set qualifications for state, not federal, office, and is not in point.

The Ninth and Tenth Amendments cannot be read to allow the states to limit their citizens' freedom of choice by adding qualifications for Congress, while Sections 2 and 3 of Article I preclude them from doing so.

V. SECTION 1983 CLAIMS

The plaintiffs also seek declaratory and injunctive relief under a federal civil rights law, 42 U.S.C. § 1983, and an awards of attorney fees under 42 U.S.C. § 1988. Since, for the reasons given above, declaratory and injunctive relief must be awarded on plaintiffs' constitutional claims -- and would thus be ordered whether or not any civil rights claims were asserted -- the only practical importance of the latter is the application for attorney fees.

Section 1983 provides:

> Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States

> . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Civil rights cases typically involve acts committed by state officials with resulting harm to the plaintiffs. The defendants Munro and Gregoire, the Washington Secretary of State and Attorney General, point out that they have done nothing yet to enforce Initiative 573. They argue that they have not subjected plaintiffs "to the deprivation of any rights," and that accordingly there is no liability under Section 1983.

The difficulty with this argument is that the Supreme Court has mandated that Section 1983 be "'broadly construed, against all forms of official violation of federally protected rights."' Dennis v. Higgins, 498 U.S. 439, 444 (1991), quoting Monell v. New York City Dept. of Social Services, 436 U.S. 658, 700-701 (1978). Threatened harm that has not yet occurred, but that will occur unless judicial relief is afforded, is enough to support a civil rights claim. See, e.g., Wright v. Roanoke Redevelopment & Housing Authority, 479 U.S. 418, 431-32 (1987). Injunctive and declaratory relief are proper under Section 1983, which authorizes, among other procedures, a "suit in equity." See, e.g., Fraser v. Bethel School Dist., 755 F.2d 1356 (9th Cir. 1985), rev'd on other grounds, 478 U.S. 675 (1986). The State defendants are prepared to enforce Initiative 573 if it is upheld, and have defended its constitutionality in this case. Since the threatened enforcement would deprive plaintiffs of constitutional rights, entitlement to injunctive and declaratory relief under Section 1983 has been shown. See Mitchum v. Foster, 407 U.S. 225, 242 (1972); see also Baer v. Meyer, 728 F.2d 471, 474-76 (10th Cir. 1984); McCarthy v. Askew, 420 F. Supp. 775, 777-79 (S.D. Fla.), aff'd, 540 F.2d 1254

(5th Cir. 1976); Sotomura v. County of Hawaii, 402 F. Supp. 95, 102-103 (D. Haw. 1975).

It does not follow, however, that attorney fees must automatically be awarded. Section 1988 provides that

> the court, in its discretion, may allow the prevailing party [in a Section 1983 case], other than the United States, a reasonable attorney's fee as part of the costs.

While a prevailing plaintiff "'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust,"' Hensley v. Eckerhart, 461 U.S. 424, 429 (1983), quoting Newman v. Piggy Park Enterprises, Inc., 390 U.S. 400, 402 (1968), a degree of discretion remains. Section 1988 should not be applied "woodenly without consideration of the underlying factors which generated it." Buxton v. Patel, 595 F.2d 1182, 1184 (9th Cir. 1979), quoting Zarcone v. Perry, 581 F.2d 1039, 1044 (2nd Cir. 1978).

The special circumstances here would make an award of fees unjust. The record shows the following, which the court now finds as facts:[8]

1. No award is needed to serve the purpose of Section 1988, which is to assure "effective access to the judicial process." Hensley, 461 U.S. at 429. This is not a typical

---

[8] The Ninth Circuit requires findings of fact and conclusions of law if fees are denied under Section 1988. Sethy v. Alameda County Water District, 602 F.2d 894, 897 (9th Cir. 1979). The facts found here are clearly shown in the record and no further hearing is required. The burden of showing special circumstances, see Herrington v. County of Sonoma, 883 F.2d 739, 744 (9th Cir. 1989), has been sustained.

civil rights case. The mere filing of suit by anyone with standing would have assured a full court test. See the briefs amicus curiae, which demonstrate this.

2. No relief has been won under the Section 1983 claims beyond that already awarded under the constitutional claims.

3. The legislation that prompted the suit was adopted by a voters' initiative, not by State officials. The deterrence purpose of Section 1983, see Wyatt v. Cole, 112 S. Ct. 1827, 1830 (1992), is inapplicable.

4. The defendant officials have not yet enforced Initiative 573. Their willingness to do so if it is upheld reflects only the minimum their oaths of office require. Cf. May v. Cooperman, 578 F. Supp. 1308 (D.N.J. 1984) (denying attorney fees as against state officials who took no action to enforce an unconstitutional statute, but granting them against state legislators who intervened).

5. The State officials have acted in good faith. "The Ninth Circuit has ruled that a defendant's good faith is one factor of several that a court may consider in applying the Attorney's Fees Act." Teitelbaum v. Sorenson, 648 F.2d 1248, 1250 (9th Cir. 1981).

6. This is a case of first impression in federal court, and the public interest requires that it be adjudicated through a full adversary process. The State defendants have done nothing to increase the litigation costs beyond what would have been necessary in any event.

7. There was no way for the State officials to settle the case by agreement. Even if a stipulation of unconstitutionality had been entered (a most unlikely event), the court would have rejected it. State legislation is presumed constitutional

until the contrary is shown. Clements v. Fashing, 457 U.S. at 963-64.

On the basis of the foregoing findings, the court now makes and enters the following conclusions of law:

1. Within the meaning of Hensley, supra, special circumstances exist in this case which would make an award of attorney fees "manifestly unfair." See Cunningham v. County of Los Angeles, 869 F.2d 427, 436-37 (9th Cir. 1988); Aho v. Clark, 608 F.2d 365, 367 (9th Cir. 1979).

2. Cases holding that particular mitigation factors are insufficient to avoid a fee award (e.g., Teitelbaum, supra, and Wilson v. Stocker, 819 F.2d 943, 951 (10th Cir. 1987)), are distinguishable. None involved the totality of circumstances present here.

3. Accordingly, plaintiffs' applications for attorney fees under 42 U.S.C. § 1988 should be denied.

VI. CONCLUSION

For the reasons stated, the motions for summary judgment are granted and denied as follows: The plaintiffs have standing to sue and these cases are ripe for decision. Plaintiffs are entitled to judgment declaring that sections 4 and 5 of Washington Initiative Measure 573, denying ballot access to certain candidates for the United States Senate and House of Representatives, are invalid under Article I, Sections 2 and 3, of the United States Constitution, and under the First and Fourteenth Amendments, and enjoining the State defendants from implementing or enforcing those sections and section 7 insofar as it incorporates them. Plaintiffs are entitled to the same relief under the provisions of 42 U.S.C. § 1983. Because special circumstances exist that would make an award unjust, plaintiffs' applications for

attorney fees under 42 U.S.C. § 1988 are denied. Judgment will be entered accordingly.

The clerk is directed to send copies of this order to counsel of record for the parties and the amici curiae.

Dated: February 10, 1994.

William L. Dwyer
United States District Judge

APPENDIX A

COMPLETE TEXT OF INITIATIVE MEASURE 573

AN ACT Relating to ballot access for elected officials; adding a new section to chapter 43.01 RCW; adding a new section to chapter 44.04 RCW; adding new sections to chapter 29.68 RCW; adding a new section to chapter 29.51 RCW; adding a new section to chapter 29.15 RCW; adding a new section to chapter 7.16 RCW; and creating a new section.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 1. The people of the state of Washington find that:

(1) The people will best be served by citizen legislators who are subject to a reasonable degree of rotation in office;

(2) Entrenched incumbents have become indifferent to the conditions and concerns of the people;

(3) Entrenched incumbents have an inordinate advantage in elections because of their control of campaign finance laws and gerrymandering of electoral districts;

(4) Entrenched incumbency has discouraged qualified citizens from seeking public office;

(5) Entrenched incumbents have become preoccupied with their own reelection and devote more effort to campaigning than to making legislative decisions for the benefit of the people;

(6) Entrenched incumbents have become closely aligned with special interest groups who provide contributions and support for their reelection campaigns, give entrenched incumbents special favors, and lobby office holders for special interest legislation to the detriment of the people of this state, and may create corruption or the appearance of corruption of the legislative system;

(7) The people of Washington have a compelling interest in preventing the self-perpetuating monopoly of elective office by a dynastic ruling class.

The people of the state of Washington therefore adopt this act to limit ballot access of candidates for state and federal elections.

NEW SECTION. Sec. 2. A new section is added to chapter 43.01 RCW to read as follows:

(1) No person is eligible to appear on the ballot or file a declaration of candidacy for governor who, by the end of the then current term of office will have served, or but for resignation would have served, as governor during eight of the previous fourteen years.

(2) No person is eligible to appear on the ballot or file a declaration of candidacy for lieutenant governor who, by the end of the then current term of office will have served, or but for resignation would have served, as lieutenant governor during eight of the previous fourteen years.

NEW SECTION. Sec. 3. A new section is added to chapter 44.04 RCW to read as follows:

(1) No person is eligible to appear on the ballot or file a declaration of candidacy for the house of representatives of the legislature who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the house of representatives of the legislature during six of the previous twelve years.

(2) No person is eligible to appear on the ballot or file a declaration of candidacy for the senate of the legislature who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the senate of the legislature during eight of the previous fourteen years.

(3) No person is eligible to appear on the ballot or file a declaration of candidacy for the legislature who has served as a member of the legislature for fourteen of the previous twenty years.

NEW SECTION. Sec. 4. A new section is added to chapter 29.68 RCW to read as follows:

No person is eligible to appear on the ballot or file a declaration of candidacy for the United States house of representatives who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the United States house of representatives during six of the previous twelve years.

NEW SECTION. Sec. 5. A new section is added to chapter 29.68 RCW to read as follows:

No person is eligible to appear on the ballot or file a declaration of candidacy for the United States senate who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the United States senate during twelve of the previous eighteen years.

NEW SECTION. Sec. 6. A new section is added to chapter 29.51 RCW to read as follows:

Nothing in sections 2 through 5 of this act prohibits a qualified voter of this state from casting a ballot for any person by writing the name of that person on the ballot in accordance with RCW 29.51.170 or from having such a ballot counted or tabulated, nor does anything in sections 2 through 5 of this act prohibit a person from standing or campaigning for an elective office by means of a write-in campaign.

NEW SECTION. Sec. 7. A new section is added to chapter 29.15 RCW to read as follows:

(1) The secretary of state or other election official authorized by law shall not accept or verify the signatures, nor accept a declaration of candidacy or a nomination paper, from or on behalf of a person who, by reason of sections 2 through 5 of this act, is ineligible for the office, nor allow the person's name to appear on the ballot.

(2) No terms or years served in office before November 3, 1992, may be used to determine eligibility to appear on the ballot.

NEW SECTION. Sec. 8. A new section is added to chapter 29.68 RCW to read as follows:

Sections 4 and 5 of this act, regarding candidates for federal legislative office, are not effective until nine states other than Washington have passed laws limiting ballot access or terms of federal legislative office, or both, based on length of service in federal legislative office.

NEW SECTION. Sec. 9. A new section is added to chapter 7.16 RCW to read as follows:

Any resident of this state may bring suit to enforce sections 2 through 8 of this act. If the person prevails, the court shall award the person reasonable attorney's fees and costs of suit.

NEW SECTION. Sec. 10. If any provision of this act or its application to any person or circumstance is held

invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

APPENDIX B

COMPENDIUM OF RELATED LAW REVIEW ARTICLES

The constitutionality of term limits measures is discussed in the following law review articles, notes, and comments:

Brendan Barnicle, Comment, Congressional Term Limits: Unconstitutional by Initiative, 67 Wash. L. Rev. 415 (1992);

Erwin Chemerinsky, Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency, 49 Ohio St. L.J. 773 (1988);

Comment, Term Limits and the Seventeenth and Nineteenth Amendments: A Reconceptualization of Article V, 103 Yale L.J. (April, 1994) (forthcoming);

Erik H. Corwin, Recent Development, Limits on Legislative Terms: Legal and Policy Implications, 28 Har. J. On Legis. 569 (1991);

Robert C. DeCarli, Note, The Constitutionality of State Enacted Term Limits Under the Qualifications Clauses, 71 Tex. L. Rev. 865 (1993);

Troy Eid and Jim Kolbe, The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office, 69 Denv. U.L. Rev. 1 (1992);

Neil Gorsuch and Michael Guzman, Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations, 20 Hofstra L. Rev. 341 (1991);

Steven R. Greenberger, Democracy and Congressional Tenure, 41 DePaul L. Rev. 37 (1991);

Roderick M. Hills, Jr., A Defense of State Constitutional Limits on Federal Congressional Terms, 53 U. Pitt. L. Rev. 97 (1991);

Tiffanie Kovacevich, Comment, Constitutionality of Term Limitations: Can States Limit the Terms of Members of Congress?, 23 Pac. L.J. 1677 (1992);

Martin E. Latz, The Constitutionality of State-Passed Congressional Term Limits, 25 Akron L. Rev. 155 (1991);

Joshua Levy, Note, Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits, 80 Geo. L.J. 1913 (1992);

Johnathan Mansfield, Note, A Choice Approach to the Constitutionality of Term Limitation Laws, 78 Cornell L. Rev. 966 (1993);

Stephen J. Safranek, Term Limitations: Do the Winds of Change Blow Unconstitutional?, 26 Creighton L. Rev. 321 (1993).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SUSAN THORSTED; WILLIAM FIRST; and TIMOTHY S. ZENK,	)	No. C92-1763WD
Plaintiffs,	)	
v.	)	
CHRISTINE O. GREGOIRE; and RALPH MUNRO,	)	
Defendants,	)	
and	)	
SHERRY BOCKWINKEL; LIMIT; CITIZENS FOR TERM LIMITS; U.S. TERM LIMITS; ALAN M. GOTTLIEB; LEE GILL; and WILBUR B. McPHERSON,	)	JUDGMENT AND INJUNCTION
Intervenor Defendants.	)	

MARGARET COLONY; LEAGUE OF WOMEN VOTERS OF WASHINGTON; GEORGE CHEEK; JOHN CLUTE; and THOMAS FOLEY,	)	No. C93-770WD
Plaintiffs,	)	
v.	)	
RALPH MUNRO; and CHRISTINE O. GREGOIRE,	)	
Defendants,	)	
and	)	
SHERRY BOCKWINKEL; LIMIT; CITIZENS FOR TERM LIMITS; U.S. TERM LIMITS; ALAN M. GOTTLIEB; LEE GILL; and WILBUR B. McPHERSON,	)	
Intervenor Defendants.	)	

These cases having been fully decided on motions for summary judgment and to dismiss, judgment is now entered as follows:

1. Plaintiffs are awarded judgment against defendants declaring that sections 4 and 5 of the Washington Initiative Measure 573, denying ballot access to certain candidates for the United States Senate and House of Representatives, are invalid under Article I, Sections 2 and 3, of the United States Constitution, and under the First and Fourteenth Amendments. Defendants Christine O. Gregoire and Ralph Munro, Attorney General and Secretary of State of the

State of Washington, in their official capacities, are permanently enjoined from implementing or enforcing the said two sections, and from enforcing section 7 of the Initiative insofar as it incorporates sections 4 and 5.

2. Plaintiffs are awarded, under the provisions of 42 U.S.C. § 1983, the same relief specified in paragraph 1 of this judgment.

3. Because special circumstances exist which would make an award of fees unjust, plaintiffs' applications for attorney fees under 42 U.S.C. § 1988 are denied.

4. The unopposed motion in No. C92-1763WD for dismissal of defendants State of Washington, John Doe Gregoire, and Jane Doe Munro, and for dismissal of Christine O. Gregoire and Ralph Munro in their personal capacities, having been granted, judgment is entered for said defendants in that case.

DATED: February 10, 1994.

//signed//
William L. Dwyer
United States District Judge

APPENDIX C

COMPLETE TEXT OF
Initiative Measure 573

AN ACT Relating to ballot access for elected officials; adding a new section to chapter 43.01 RCW; adding a new section to chapter 44.04 RCW; adding new sections to chapter 29.68 RCW; adding a new section to chapter 29.51 RCW; adding a new section to chapter 29.15 RCW; adding a new section to chapter 7.16 RCW; and creating a new section.

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(3) Entrenched incumbents have an inordinate advantage in elections because of their control of campaign finance law and gerrymandering of electoral districts;

(4) Entrenched incumbency has discouraged qualified citizens from seeking public office;

(5) Entrenched incumbents have become preoccupied with their own reelection and devote more effort to campaigning than to making legislative decisions for the benefit of the people;

(6) Entrenched incumbents have become closely aligned with special interest groups who provide contributions and support for their reelection campaigns, give entrenched incumbents special favors, and lobby office holders for special interest legislation to the detriment of the people of

this state, and may create corruption or the appearance of corruption of the legislative system;

(7) The people of Washington have a compelling interest in preventing the self-perpetuating monopoly of elective office by a dynastic ruling class.

The people of the state of Washington therefore adopt this act to limit ballot access of candidates for state and federal elections.

NEW SECTION: Sec. 2. A new section is added to chapter 43.01 RCW to read as follows:

(1) No person is eligible to appear on the ballot or file a declaration of candidacy for governor who, by the end of the then current term of office will have served, or but for resignation would have served, as governor during eight of the previous fourteen years.

(2) No person is eligible to appear on the ballot or file a declaration of candidacy for lieutenant governor who, by the end of the then current term of office will have been served, or but for resignation would have served, as lieutenant governor during eight of the previous fourteen years.

NEW SECTION: Sec. 3. A new section is added to chapter 44.04 RCW to read as follow:

(1) No person is eligible to appear on the ballot or file a declaration of candidacy for the house of representatives of the legislature who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the house of representatives of the legislature during six of the previous twelve years.

(2) No person is eligible to appear on the ballot or file a declaration of candidacy for the senate of the legislature who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the senate of the legislature during eight of the previous fourteen years.

(3) No person is eligible to appear on the ballot or file a declaration of candidacy for the legislature

who has served is a member of the legislature for fourteen of the previous twenty years.

NEW SECTION: Sec. 4. A new section is added to chapter 29.68 RCW to read as follow:

No person is eligible to appear on the ballot or file a declaration of candidacy for United States house of representatives who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the United States house of representatives during six of the previous twelve years.

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NEW SECTION: Sec. 6. A new section is added to chapter 29.51 RCW to read as follow:

Nothing in sections 2 through 5 of this act prohibits a qualified voter of this state from casting a ballot for any person by writing the name of that person on the ballot in accordance with RCW 29.51.170 or from having such a ballot counted or tabulated, nor does anything in sections 2 through 5 of this act prohibit a person from standing or campaigning for an elective office by means of a write-in campaign.

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(2) No terms or years served in office before November, 1992, may be used to determine eligibility to appear on the ballot.

NEW SECTION: Sec. 8. A new section is added to chapter 29.68 RCW to read as follows:

Sections 4 and 5 of this act, regarding candidates for federal legislative office, are not effective until nine states other than Washington have passed laws limiting ballot access or terms of federal legislative office, or both, based on length of service in federal legislative office.

NEW SECTION: Sec. 9. A new section is added to chapter 7.16 RCW to read as follows:

Any resident of this state may bring suit to enforce sections 2 through 8 of this act. If the person prevails, the court shall award the person reasonable attorney's fees and costs of suit.

NEW SECTION: Sec. 10. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

APPENDIX D

INITIATIVE MEASURE 573
To the People

Note: The ballot title and explanatory statement were written by the Attorney General as required by law. The complete text of Initiative Measure 573 begins on page 10.

Official Ballot Title:

Shall candidates for certain offices, who have already served for specified time periods in those offices, be denied ballot access?

The law as it now exists:

The length of previous service in public office does not disqualify anyone from appearing on the election ballot for state offices. One can be a candidate on the election ballot for election or re-election to the state legislature, governor, lieutenant governor, or congress without any limits based on prior service in those offices.

Statement for

"I'm in favor of term limits, six years, not twelve. Why? Because career politicians have long been bilking the public," broadcast journalist David Brinkley, *People* Magazine, 7/27/92.

REDUCE THE INFLUENCE OF SPECIAL INTERESTS

Incumbents easily dominate elections through free mailing, large staffs, and special interest funding. By leveling the playing field, term limits will attract more candidates thereby offering voters real choices. Initiative 573 will force rotation in office, breaking up long-term relationships.

NO LOSS OF INFLUENCE WITH INITIATIVE 573

Washington state will not lose its congressional clout.

Federal limits will not take effect until nine other states adopt similar legislation.

Incumbents who reach the limits of their terms may run as write-in candidates.

Initiative 573 is not retroactive; previous time in office is not counted.

TERM LIMITS IS A NATIONAL MOVEMENT

Washington state is not alone. Citizens in at least 15 states will vote on term limits this November.

Our Founding Fathers never envisioned career politicians. Many officials already have limited terms: President, 31 governors, and many county and city politicians. In 1990, California, Colorado and Oklahoma adopted term limits.

Term limits will replace the seniority based system with one based on merit.

RESTORE CHOICE TO THE VOTER

As Harry Truman said, term limits would "*help cure senility and seniority--both terrible legislative diseases.*"

Career politicians gave us a national debt of $4 trillion, a peacetime tax burden that is the highest in our nation's history, the S & L bailout and outrageous congressional banking and postal scandals that defy the ethics of public office.

It's time for a change. We need term limits.

Vote YES on Initiative 573.

Rebuttal of Statement against

We listened to the voters and improved term limits.

Term limits reduces the power of special interests, not the interests of the people.

Incumbents are re-elected 96% of the time. Incumbent turnover this year is high due to redistricting, scandals and converting campaign funds to personal loot.

We have the most "experienced" legislature and Congress ever, causing the worst deficits and scandals ever. People want change, not deadwood.

Washington needs term limits. Vote Yes on I-573.

Voters Pamphlet Statement Prepared by:

WALLACE M. RUDOLPH, Professor of Constitutional, Legislative and Administrative Law, Puget Sound School of Law; JACK METCALF, State Senator, Chair of Senate Environmental and Natural Resources Committee; SHERRY BOCKWINKEL, Independent Businesswoman.

Advisory Committee: CAROLYN LOGUE, Director, National Federation of Independent Business; PAUL BARDEN, King County Councilman; HAROLD KEAN, former Chairman and CEO of Washington Federal Savings and Loan; SAM ALLRED, Democratic Precinct Chair, Sumner; JOHN SONNELAND, M.D., Spokane area businessman and professional.

The effect of Initiative Measure 573,
of approved into law:

This initiative would consider only years of service in office after November 3, 1992 to deny some potential candidates access to the election ballot. Service prior to that date would not count.

The offices and length of service for which a potential candidate would be denied access to the election ballot are:

1) for governor, if the candidate served 8 of the previous 14 years as governor;

2) for lieutenant governor, if the candidate served 8 of the previous 14 years as lieutenant governor;

3) for senator in the state legislature, if the candidate served 8 of the previous 14 years as a senator;

4) for representative in the state legislature, if the candidate served 6 of the previous 12 years as a representative; and

5) for either the house or senate in the state legislature, if the candidate served in the legislature for 14 of the previous 20 years.

While such potential candidates would not be permitted to appear upon the ballot, a write-in candidacy is permitted.

This initiative also provides that only if 9 other states pass laws limiting ballot access or limiting the terms of federal legislative offices, would Congressional representatives and United States senators from Washington state be subject to restrictions for access to the election ballot. Only the years of service which occur after November 2, 1992 would be considered. Service prior to that date would not count.

If nine other states act, then the Congressional offices and the time periods which would deny a potential candidate access to the election ballot would be:

1) for a Washington representative to the United States Congress, if the candidate served as a representative for 6 of the previous 12 years; and

2) for a United States senator from Washington, if the candidate served as senator for 12 of the previous 18 years.

Write-in candidacies would be permitted for such offices.

Statement against

NEW, IMPROVED TERM LIMITS? DON'T BELIEVE IT

Washington citizens rejected term limits in 1991, and their reasons remain valid in 1992. Delaying term limit restrictions a few years doesn't make the repercussions more acceptable.

TERM LIMITS THREATEN OUR QUALITY OF LIFE

Last November, voters said they weren't willing to give up this state's strength in Congress in 1994. Is it somehow more acceptable to give it up in 1998? Will our concerns about offshore drilling, affordable power, transportation funding, Hanford cleanup, and other federally decided issues be diminished by then? Are we willing to play Russian Roulette with Washington's future and unilaterally give away the strength we've taken years to achieve?

TERM LIMITS ARE UNNECESSARY

This year alone, Washington state will experience turn-overs of AT LEAST 45 percent in our congressional delegation, 30 percent in the state Senate, and 29 percent in the state House of Representatives. And at least four of the nine statewide offices will change hands.

WE NEED A MIX OF NEW AND EXPERIENCED LAWMAKERS WORKING FOR US

No one wants stagnation in government, but the arbitrary cutoffs imposed by I-573 would cost us vital knowledge, expertise and clout. We all benefit when new office-holders are able to work alongside veterans to learn the ropes and become skilled lawmakers working successfully for their constituents.

The key to responsive government is dedicated, informed voters - voters who examine candidates carefully, communicate their community's priorities, and refuse to reelect politicians who fail to meet expectations.

No citizen should give up the right to elect, or reelect, the leader of her/his choice.

Say NO to the term limit crusade and yes to effective government.

Rebuttal of Statement for

Term limits would take away your right to choose.

If you don't like the elected officials serving you now, use your democratic right to vote to get them out of office. But if your elected officials are doing a good job, keep them in office. That's the choice you have now, and that's the choice you would lose with term limits.

Term limits take away your freedom and our clout in Washington, D.C. Vote NO.

For more information call (206) 628-6163.

Supreme Court, U.S.
FILED
JUN - 7 1994
OFFICE OF THE CLERK

No. 93-1833

IN THE

Supreme Court of the United States

October Term, 1993

CITIZENS FOR TERM LIMITS,
Petitioners,

v.

MARGARET COLONY, LEAGUE OF WOMEN VOTERS OF WASHINGTON, GEORGE CHEEK, JOHN CLUTE, and THOMAS FOLEY;

SUSAN THORSTED, WILLIAM FIRST, and TIMOTHY S. ZENK,
Respondents.

Petition for Writ of Certiorari to the Court of Appeals, Ninth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for *Colony* Respondents

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10 pp

QUESTION PRESENTED

May a state impose term limit qualifications on certain incumbent candidates for the United States Congress without violating the Qualifications Clauses of the Constitution and the First and Fourteenth Amendments?

PARTIES TO THE PROCEEDING

Respondents in this Court were the plaintiffs in two consolidated cases in the U.S. District Court for the Western District of Washington, *Colony v. Munro* and *Thorsted v. Gregoire*.

Respondent League of Women Voters of Washington is a non-profit corporation organized under the laws of Washington. The League has no parent companies or subsidiaries. The League's members are registered voters in every congressional district in the state of Washington.

Respondents Margaret Colony, George Cheek, and John Clute are registered voters and residents of the state of Washington. Thomas Foley is a member of the United States House of Representatives, representing the Fifth Congressional District of Washington.

Respondents Thorsted, First, and Zenk are registered voters and residents of the state of Washington.

The petitioners in this Court are Citizens for Term Limits, a defendant-intervenor in the district court, and Christine Gregoire and Ralph Munro, the state defendants in the lower court. The other parties who defended Washington's Term Limits Law in the court below and are appellants in the Ninth Circuit Court of Appeals are: LIMIT, Sherry Bockwinkel, U.S. Term Limits, Alan M. Gottlieb, Lee Gill and Wilbur B. McPherson.

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Thorsted v. Gregoire, 841 F. Supp. 1068 (W.D. Wash 1994), *appeals pending* Nos. 94-35222, 94-35223, 94-35267, 94-35285, 94-35287, 94-35289 (9th Cir. 1994). 3, 4

U.S. Term Limits v. Hill, 316 Ark. 251, 872 S.W.2d 349 (1994).....3

No. 93-1833

In The

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Petition for Writ of Certiorari to the Court of Appeals, Ninth Circuit

RESPONDENTS' JOINT RESPONSE TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the United States District Court for the Western District of Washington declaring the Washington Term Limits Law unconstitutional is reported at 841 F. Supp. 1068 (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Article I.

U.S. Constitution, Article I, Sections 2 and 3.

U.S. Constitution, Article I, Section 4.

U.S. Constitution, First Amendment.

U.S. Constitution, Fourteenth Amendment.

42 U.S.C. Sections 1983 and 1988.

STATEMENT OF THE CASE

In November 1992, Initiative Measure 573, the Washington Term Limits Law, was enacted. The Term Limits Law bars certain incumbent candidates for the United States Congress from appearing on the primary and general election ballot under any circumstances, bars them from filing a declaration of candidacy, bars them from being nominated by their political party, and bars them from appearing in any voter or candidate pamphlet.

The Term Limits Law bars constitutionally qualified candidates from the ballot with the express purpose and likely effect that they will not be re-elected.

ARGUMENT AND AUTHORITIES

Petitioner Citizens for Term Limits ("CTL")[1] and petitioners Christine Gregoire and Ralph Munro (the "State Defendants")[2] ask this Court to grant certiorari before judgment in the Ninth Circuit Court of Appeals, where appeals from the decision of the Western District of Washington holding Washington's Term Limits Law unconstitutional are pending.[3] This joint response is to both the CTL and State Defendant petitions.

CTL and the State Defendants have filed their petitions to coincide with petitions for writ of certiorari filed by U.S. Term Limits, Inc.[4] and the State of Arkansas[5] seeking review of *U.S. Term Limits v. Hill*, 316 Ark. 251, 872 S.W.2d 349 (1994).

The appropriateness of granting the CTL and State Defendant petitions depends entirely on the action this Court takes on the petitions filed in *Hill*. If this Court denies the *Hill* petition, then it should deny the petitions herein. There is ample ground to deny both petitions. The decision of the Western District in *Thorsted v. Gregoire* (as well as the decision of the Arkansas Supreme Court in *Hill*) is controlled by this Court's decision in *Powell v. McCormack*, 395 U.S. 486 (1969), and is consistent with the decision of every other court to consider the constitutionality of limiting the terms of members of Congress. *See U.S. Term Limits v. Hill*, 316

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[1] *Citizens for Term Limits v. Foley*, Sup. Ct. No. 93-1833.

[2] *Gregoire v. Thorsted*, Sup. Ct. No. _____ (filed June 7, 1994).

[3] *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash 1994), *appeals pending* Nos. 94-35222, 94-35223, 94-35267, 94-35285, 94-35287, 94-35289 (9th Cir. 1994).

[4] *U.S. Term Limits, Inc. v. Thornton*, Sup. Ct. No. 93-1456.

[5] *Arkansas ex rel. Bryant v. Hill*, Sup. Ct. No. 93-1828.

Ark. 251, 872 S.W.2d 349 (1994); *Stumpf v. Lau*, 108 Nev. 826, 839 P.2d 120 (1992).

The constitutionality of state-enacted limits on congressional terms is before the Ninth Circuit in *Thorsted v. Gregoire*; the opinion and analysis of the Ninth Circuit may assist this Court in determining which issues, if any, merit review.

CONCLUSION

There are ample grounds to deny all certiorari petitions arising out of the decisions of the Western District of Washington and the Arkansas Supreme Court declaring the state-enacted term limit laws unconstitutional.

The Court's decision on whether to grant or deny the CTL and State Defendant petitions should be made in tandem with, and should be consistent with, the Court's decision on the Arkansas petitions for certiorari.

DATED June 7, 1994.

Respectfully submitted,

PRESTON GATES & ELLIS

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Supreme Court, U.S.
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(3) (2)

Nos. 93-1833 and 93-1955

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CITIZENS FOR TERM LIMITS,
Petitioner,
v.
THOMAS FOLEY, *et al.*,
Respondents.

CHRISTINE O. GREGOIRE, *et al.*,
Petitioners,
v.
SUSAN THORSTED, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MEMORANDUM IN RESPONSE TO PETITIONS FOR CERTIORARI

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4pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

Nos. 93-1833 and 93-1955

CITIZENS FOR TERM LIMITS,
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v.

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Respondents.

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Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MEMORANDUM IN RESPONSE TO PETITIONS FOR CERTIORARI

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1. These petitions seek review by this Court of an order of a district court before judgment in the court of appeals. Under this Court's Rule 11, that is a procedure appropriate only in a situation of "imperative public importance."

2. There is no question that the issue of the constitutionality of state laws that restrict long-time congressional

incumbents from having their names printed on the ballot is important. It affects the process of elections to Congress. It has created deep conflict among federal circuits and state supreme courts as to whether ballot restrictions amount to qualifications for congressional office. It merits review by this Court.

However, it is already before this Court through normal procedure in Nos. 93-1456 and 93-1828, which seek review of the Supreme Court of Arkansas' resolution of this very issue. In fact, petitioner in No. 93-1833 has filed a brief in No. 93-1828 as *amicus curiae*.

3. The District Court's ruling here essentially duplicates the holding of the Supreme Court of Arkansas already presented in Nos. 93-1456 and No. 93-1823.[1] It therefore does not appear to present a compelling occasion for the extraordinary procedure of certiorari before judgment in the court of appeals. However, the ruling in the state of Washington certainly underscores the widespread and burgeoning national impact of the issue, and the necessity for a resolution by this Court. See, *e.g.*, *Opinion of the Justices*, 413 Mass. 1201, 1217, 595 N.E.2d 292, 302 (1992) (declining to "predict the view the Supreme Court ultimately would take"). If this Court wishes to consider two very similar state laws[2] instead of one, the present petitions present an appropriate vehicle.

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[1] The District Court relied alternatively on the Fourteenth Amendment as well as Article I; the Arkansas Supreme Court relied simply on Article I, while rejecting the Arkansas respondents' Fourteenth Amendment challenge to actual term limits on state officials. The Arkansas respondents of course can raise their Fourteenth Amendment argument in this Court as an alternative basis for affirmance.

[2] The Washington ballot regulation after the stated period of incumbency applies for six years; the Arkansas provision applies permanently for a particular office.

CONCLUSION

For the reasons stated, the petitions should be denied or held for disposition in light of Nos. 93-1456 and 93-1828.

Respectfully submitted,

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June 13, 1994

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FILED
JUN 9 1994
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No. 93-1833

In the

Supreme Court of the United States

October Term, 1993

CITIZENS FOR TERM LIMITS,
Petitioner,

v.

THOMAS FOLEY, JOHN CLUTE, GEORGE CHEEK, LEAGUE OF WOMEN VOTERS OF WASHINGTON, MARGARET COLONY, TIMOTHY S. ZENK, WILLIAM FIRST, and SUSAN THORSTED, et al.,
Respondents.

Petition for Writ of Certiorari to the Court of Appeals, Ninth Circuit

MOTION TO EXPEDITE CONSIDERATION

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Attorneys for Petitioner

Pursuant to Rule 21 of the Rules of this Court, petitioner Citizens for Term Limits respectfully moves this Court to expedite the consideration of the petition for writ of certiorari in this case so that it may be discussed at the June 17, 1994, conference.

Petitioner has been informed by Frank Lorson, a clerk of this Court, that petitions for writ of certiorari filed in Docket No. 93-1456 (*U.S. Term Limits v. Thornton*) and Docket No. 93-1828 (*State of Arkansas ex rel. Winston Bryant v. Hill*), both of which involve the constitutionality of an Arkansas initiative limiting ballot access to longtime incumbents, have been scheduled for conference on June 17, 1994.

The petition in the instant case also addresses the issue of the constitutionality of a Washington initiative that limits ballot access to longtime incumbents. Because of the similarity in subject matter to the Arkansas initiative, petitioner in this case filed the instant petition at a time that would allow it to be considered concurrently with the petitions in the cases noted above. The respondents to the petition in this case would suffer no prejudice from the granting of this motion because Thomas Foley, *et al.*, primary respondents to this petition, filed their response to the petition on or about June 8, 1994. Respondents LIMIT and Sherry Bockwinkel; and respondents Thomas Foley and all plaintiffs below have authorized Citizens for Term Limits to state that they join in this motion to expedite consideration.

Petitioner has also been informed by Mr. Lorson that ordinarily the petition for writ of certiorari filed by the State of Washington from the same judgment as the instant case (*Gregoire v. Thorsted*, Docket No. 93-1955) on or about June 3, 1994, would extend the time for the conference on the petition in this case. However, petitioner understands that

the State of Washington will be filing a motion to expedite consideration of the *Gregoire v. Thorsted* petition concurrent with this motion. Because the State's petition addresses the same lower court decision to which the primary respondents have already submitted a response to this Court in this case, no prejudice would result from expediting both of the petitions dealing with the Washington initiative.

For the reasons stated herein, petitioner Citizens for Term Limits respectfully requests that the motion to expedite be granted.

DATED: June 9, 1994.

Respectfully submitted,

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By /s/ Deborah J. La Fetra
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Attorney for Petitioner

DECLARATION OF SERVICE BY MAIL

I, Dana M. Olsen, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 2151 River Plaza Drive, Suite 305, Sacramento, California.

On June 9, 1994, true copies of MOTION TO EXPEDITE CONSIDERATION were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 9th day of June, 1994, at Sacramento, California.

Dana M Olsen
DANA M. OLSEN

ORIGINAL

Supreme Court, U.S.
FILED
JUN 13 1994
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IN THE
SUPREME COURT OF THE UNITED STATES

Nos. 93-1833 and 93-1955

CITIZENS FOR TERM LIMITS,

Petitioner,

v.

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Respondents.

CHRISTINE O. GREGOIRE, et al.,

Petitioners,

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SUSAN THORSTED, et al.,

Respondents.

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On Petitions for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONSE TO MOTIONS TO EXPEDITE
CONSIDERATION

Petitioners in both these cases seek to advance consideration of their petitions for certiorari before judgment in the Court of Appeals, and to have this Court review the constitutionality of a Washington law restricting ballot appearances of multi-term congressional incumbents. A very similar provision was held unconstitutional by the Supreme Court of Arkansas, a judgment which is before this Court in Nos. 93-1456 and 93-1828.

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U.S. Term Limits, Inc., respondent here, is also petitioner in the Arkansas case, No. 93-1456. For the reasons stated in U.S. Term Limits' response to the present petitions (filed today), the two cases are so similar that there appears no compelling reason to grant certiorari before judgment to add the Washington petitions to the Arkansas ones. The Washington ruling does, however, underscore the national impact of this issue and the need for this Court's prompt consideration and review of the Arkansas decision.

CONCLUSION

For the reasons stated, the motions to expedite should be denied.

Respectfully submitted,

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June 13, 1994

CERTIFICATE OF SERVICE

I certify that I have this 13th day of June 1994 caused one copy of the foregoing Response to Motions to Expedite Consideration to be deposited in the U.S. mail, first-class postage prepaid, and also sent by fax, addressed to each of the following:

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All parties required to be served have been served.

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